

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

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

Plaintiffs,

v.

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

Federal Defendants.

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

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7(h), Plaintiffs Natural Resources Defense Council, Center for Biological Diversity, and Friends of Minnesota Scientific and Natural Areas ("Plaintiffs") move for summary judgment in the above-captioned action. In support of their motion, Plaintiffs submit the accompanying Memorandum of Points and Authorities and the attached declarations of Clay Bolt, Jason Taylor, Gina Trujillo, Thomas E. Casey, David Noah Greenwald, Andrew Wedel, and Bryan P. Newman.

Dated: December 6, 2021

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION1

STATUTORY AND REGULATORY FRAMEWORK3

I. The ESA and its critical-habitat mandate3

II. The “not prudent” exception to the ESA’s mandate to designate critical habitat.....6

 A. The 2016 Regulation.....6

 B. The 2019 Regulation.....7

FACTUAL BACKGROUND.....8

I. The rusty patched bumble bee8

 A. The bee’s life cycle shapes its habitat needs.....9

 B. Habitat destruction and degradation are a primary cause of the bee’s decline.....12

 C. Habitat management and protection are essential to the bee’s survival and recovery15

II. The Service’s listing and critical-habitat determinations for the rusty patched bumble bee18

 A. The Service listed the bee as endangered in part because of the “high-severity” stressor of habitat loss and degradation.....18

 B. The Service nonetheless determined that designation of critical habitat would be “not prudent”19

STANDARD OF REVIEW21

ARGUMENT22

I. Although the Service did not take a position on whether the 2016 Regulation or 2019 Regulation applies to its Not-Prudent Decision, the 2016 Regulation applies.....23

II. The Service’s No-Benefit Determination violates the ESA and APA.....25

A.	The Service misapplied the ESA’s “not prudent” exception	25
1.	The ESA authorizes the Service to withhold critical habitat as “not prudent” only in narrow circumstances when designation would not benefit a species	25
2.	The Service withheld critical habitat as “not prudent” for reasons that, on their face, fail to establish a lack of benefit for the bee	29
B.	The Service failed to explain how its No-Benefit Determination is supported by the record	32
III.	The Service’s Catch-All Determination violates the ESA and APA	39
IV.	Plaintiffs have standing to challenge the Service’s refusal to designate critical habitat	42
	CONCLUSION.....	45
	CERTIFICATE OF SERVICE	47

TABLE OF AUTHORITIES

Cases

<i>Am. Trucking Ass’ns, Inc. v. Fed. Motor Carrier Safety Admin.</i> , 724 F.3d 243 (D.C. Cir. 2013).....	43
<i>Burlington Truck Lines v. United States</i> , 371 U.S. 156 (1962).....	22, 32
<i>Cape Hatteras Access Pres. All. v. U.S. Dep’t of the Interior</i> , 731 F. Supp. 2d 15 (D.D.C. 2010).....	4
<i>In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.</i> , 794 F. Supp. 2d 65 (D.D.C. 2011).....	40
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971).....	21
<i>City of Las Vegas v. Lujan</i> , 891 F.2d 927 (D.C. Cir. 1989).....	41
<i>Columbia Gas Transmission Corp. v. FERC</i> , 448 F.3d 382 (D.C. Cir. 2006).....	37
<i>Commc’ns & Control, Inc. v. FCC</i> , 374 F.3d 1329 (D.C. Cir 2004).....	37
<i>Conservation Council for Haw. v. Babbitt</i> , 2 F. Supp. 2d 1280 (D. Haw. 1998).....	28
<i>Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.</i> , 789 F.3d 1075 (9th Cir. 2015).....	34
<i>Ctr. for Biological Diversity v. EPA</i> , 861 F.3d 174 (D.C. Cir. 2017).....	5
<i>Dist. Hosp. Partners, L.P. v. Burwell</i> , 786 F.3d 46 (D.C. Cir. 2015).....	22
<i>District of Columbia v. Dep’t of Lab.</i> , 819 F.3d 444 n.6 (D.C. Cir. 2016).....	38
<i>Enos v. Marsh</i> , 769 F.2d 1363 (9th Cir. 1985).....	27

Fogo De Chao (Holdings) Inc. v. U.S. Dep’t of Homeland Sec.,
769 F.3d 1127 (D.C. Cir. 2003).....39

Friends of Animals v. Ross,
396 F. Supp. 3d 1 (D.D.C. 2019).....45

Genus Med. Techs. LLC v. U.S. Food & Drug Admin.,
994 F.3d 631 (D.C. Cir. 2021).....26

Growth Energy v. EPA,
5 F.4th 1 (D.C. Cir. 2021).....43

Haz. Waste Treatment Council v. EPA,
861 F.2d 270 (D.C. Cir. 1988).....43

Marsh v. Or. Nat. Res. Council,
490 U.S. 360 (1989).....27

Mendoza v. Perez,
754 F.3d 1002 (D.C. Cir. 2014).....42

Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983).....21, 22, 32

N. Spotted Owl v. Lujan,
758 F. Supp. 621 (W.D. Wash. 1991).....27

NRDC v. Rauch,
244 F. Supp. 3d 66 n.22 (D.D.C. 2017).....45

**NRDC v. U.S. Dep’t of the Interior*,
113 F.3d 1121 (9th Cir. 1997)27, 28, 30, 32

Oceana, Inc. v. Ross,
321 F. Supp. 3d 128 (D.D.C. 2018).....41

**Sierra Club v. U.S. Fish & Wildlife Serv.*,
245 F.3d 434 (5th Cir. 2001)28, 30

Sw. Ctr. for Biological Diversity v. Babbitt,
215 F.3d 58 (D.C. Cir. 2000).....41

**Tenn. Valley Auth. v. Hill*, 437 U.S.....3, 4, 26, 40

U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.,
141 S. Ct. 777 (2021).....5

U.S. Postal Serv. v. Postal Regul. Comm’n,
886 F.3d 1261 (D.C. Cir. 2018)39

Wash. Toxics Coal. v. EPA,
413 F.3d 1024 (9th Cir. 2005)33, 34

Statutes

5 U.S.C. § 706(2)21

5 U.S.C. § 706(2)(A).....22, 25

16 U.S.C. § 1531(b)1, 3, 26

16 U.S.C. § 1532(2)4

16 U.S.C. § 1532(3)1, 27

16 U.S.C. § 1532(5)(A).....32, 37

16 U.S.C. § 1532(5)(A)(i).....4

16 U.S.C. § 1532(5)(A)(ii).....4

16 U.S.C. § 1532(6)3

16 U.S.C. § 1533.....18

16 U.S.C. § 1533(a)(3)(A)4, 40

16 U.S.C. § 1533(a)(3)(A)(i)1

16 U.S.C. § 1533(b)(2)5, 40

16 U.S.C. § 1533(b)(6)(C)3, 6, 22, 26

*16 U.S.C. § 1533(b)(6)(C)(ii)1, 2, 4, 5, 19, 40

16 U.S.C. § 1536(a)(2).....5, 31, 32, 33, 37, 44

16 U.S.C. § 1536(b)(3)(A).....5, 38

16 U.S.C. § 1536(b)(4)5

16 U.S.C. § 1536(g)5

16 U.S.C. § 1538(a)5

Regulations & Federal Register Documents

*50 C.F.R. § 424.12(a)(1).....7, 20

*50 C.F.R. § 424.12(a)(1) (2016)6

*50 C.F.R. § 424.12(a)(1)(v)8, 39

50 C.F.R. § 424.12(a)(2).....4

50 C.F.R. § 424.195

*81 Fed. Reg. 7414 (Feb. 11, 2016)6, 28, 30

Legislative History

*H.R. Rep. No. 95-1625, 1978 WL 8486, at 17 (1978),
as reprinted in 1978 U.S.C.C.A.N. 9453.....6, 27

*S. Rep. No. 106-126, 1999 WL 33592886 (1999).....27

Federal Rules of Civil Procedure

Fed. R. Civ. P. 56(c)22

Other Authorities

Compl., *NRDC v. Bernhardt*,
 No. 1:19-cv-00078-RMC (D.D.C. Jan. 15, 2019), ECF No. 12

Compl., *NRDC v. U.S. Dep’t of the Interior*,
 No. 1:17-cv-01130-AJN (S.D.N.Y. Feb. 15, 2017), ECF No. 1.....2

Compl., *Xerces Soc’y for Invert. Conservation v. U.S. Dep’t of the Interior*,
 No. 1:14-cv-00802-ABJ (D.D.C. May 13, 2014), ECF No. 11

Conservation Pls.’ Refiled Mot. & Mem. for Summ. J., *Ctr. for Biological Diversity v. Bernhardt*,
 No. 4:19-cv-05206-JST (N.D. Cal. Oct. 15, 2021), ECF No. 142.....8

Second Am. Compl. for Declaratory & Injunctive Relief, *Ctr. for Biological Diversity v. Bernhardt*,
 No. 4:19-cv-05206-JST (N.D. Cal. June 4, 2020), ECF No. 90.....8

Stip. Settlement Agreement ¶ 1, *NRDC v. Bernhardt*,
No. 1:19-cv-00078-RMC (D.D.C. Sep. 25, 2019), ECF No. 202

INTRODUCTION

The rusty patched bumble bee, once a common and important native pollinator of many crops and wild plants, has disappeared from about 87 percent of its historical range. Remaining populations teeter on the brink of extinction, imperiled by habitat loss and degradation (through widespread pesticide use and other factors), climate change, and disease. But despite having listed the bee as an endangered species in 2017, the U.S. Fish and Wildlife Service (“the Service”) has failed to afford the bee one of the most foundational protections under the Endangered Species Act (ESA or “the Act”)—designation of “critical habitat.”

The ESA was enacted in 1973 to halt and reverse species extinction. To that end, it contemplates the use of “all methods and procedures which are necessary” to protect both endangered species and the “ecosystems” on which they depend. *See* 16 U.S.C. §§ 1531(b), 1532(3). Designation of “critical habitat”—areas of habitat essential to a species’ conservation that are subject to special protections from destruction and degradation—is central to this goal. The ESA requires that the Service designate critical habitat for species immediately at the time of listing “to the maximum extent prudent and determinable.” *Id.* § 1533(a)(3)(A)(i). If designation of critical habitat is not “determinable” at the time of listing, the ESA allows the Service a one-year extension, at the end of which it “shall” designate critical habitat “to the maximum extent prudent.” *Id.* § 1533(b)(6)(C)(ii).

In defiance of the ESA’s directives, the Service has, at every turn, delayed—and outright resisted—protecting the rusty patched bumble bee and its habitat. In 2013, the Xerces Society for Invertebrate Conservation petitioned the Service to list the bee as an endangered species. Nearly four years and two lawsuits later,¹ the Service finally listed the bee. *See* Proposed Listing

¹ *See* Compl., *Xerces Soc’y for Invert. Conservation v. U.S. Dep’t of the Interior*,

Decision, RPBB0154-64; Listing Decision, RPBB0125-48. In its Listing Decision, the Service identified habitat loss and degradation as one of the “primary causes” of the bee’s decline and acknowledged that the bee’s few remaining colonies “continue to be affected by high-severity stressors, including . . . habitat loss and degradation, . . . throughout all of the species’ range.” RPBB0125, 144. The Service nevertheless did not designate critical habitat at that time, finding it to be “not determinable.” *Id.* at RPBB0146. This extended the statutory deadline for the Service’s critical-habitat determination by one year. 16 U.S.C. § 1533(b)(6)(C)(ii).

That deadline, too, came and went. Plaintiff Natural Resources Defense Council (NRDC) sued a third time, resulting in a settlement requiring the Service to make a critical-habitat determination by July 31, 2020.² In September 2020, the Service issued a final decision declining to designate *any* critical habitat, asserting that doing so would be “not prudent.” Not-Prudent Decision, RPBB0001-05. NRDC, the Center for Biological Diversity, and the Friends of Minnesota Scientific and Natural Areas (“Plaintiffs”) now challenge this decision.

In commanding the Service to designate critical habitat “to the maximum extent prudent,” 16 U.S.C. § 1533(b)(6)(C)(ii), Congress required designation of critical habitat except in rare circumstances where designation would not benefit the relevant species. Rather than providing even a facially plausible explanation for why designation would not benefit the bee, however, the Service based its decision on a scattershot collection of assertions that, if accepted,

No. 1:14-cv-00802-ABJ (D.D.C. May 13, 2014), ECF No. 1 (challenging the Service’s failure to respond to the listing petition); Compl., *NRDC v. U.S. Dep’t of the Interior*, No. 1:17-cv-01130-AJN (S.D.N.Y. Feb. 15, 2017), ECF No. 1 (challenging the Service’s rule delaying the effective date of its final rule listing the bee as an endangered species).

² See Compl., *NRDC v. Bernhardt*, No. 1:19-cv-00078-RMC (D.D.C. Jan. 15, 2019), ECF No. 1; Stip. Settlement Agreement ¶ 1, *NRDC v. Bernhardt*, No. 1:19-cv-00078-RMC (D.D.C. Sep. 25, 2019), ECF No. 20.

would expand the “not prudent” exception well beyond statutory bounds. Moreover, the Service’s assertions cannot be squared with the overwhelming record evidence that habitat loss and degradation are a “primary cause[]” of the bee’s decline, Listing Decision, RPBB0125, or that habitat protection and management are both feasible and “necessary” to the bee’s recovery, Draft Recovery Plan, RPBB0042, 49-50. The Service’s Not-Prudent Decision leaves the critically endangered bee vulnerable to further habitat destruction and degradation—even as the Service recognizes that the bee no longer has “the adaptive capacity . . . to withstand physical and biological changes in the environment presently or into the future,” Listing Decision, RPBB0144.

The Service’s Not-Prudent Decision therefore contravenes the ESA and is arbitrary and capricious in violation of the Administrative Procedure Act (APA). Plaintiffs respectfully request that the Court set aside this unlawful decision and direct the Service to designate critical habitat for the bee “to the maximum extent prudent,” 16 U.S.C. § 1533(b)(6)(C), consistent with the ESA.

STATUTORY AND REGULATORY FRAMEWORK

I. The ESA and its critical-habitat mandate

Congress enacted the ESA “to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). The ESA’s purposes include “provid[ing] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “provid[ing] a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b); *see also id.* § 1532(6), (20) (defining “endangered” and “threatened” species). “Lest there be any ambiguity as to the meaning of this statutory directive,” Congress “specifically defined ‘conserve’ as meaning ‘to

use and 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 [the ESA] are no longer necessary.” *Tenn. Valley Auth.*, 437 U.S. at 153 (emphasis omitted) (quoting 16 U.S.C. § 1532(2)).

In designing the ESA to stop and reverse biodiversity loss, *id.* at 184, Congress recognized the “destruction of natural habitats” to be the “greatest” cause of species extinction, *see id.* at 179. Consistent with this understanding, section 4 of the ESA provides that the Service³ “shall, concurrently with” determining that a species is endangered or threatened (i.e., “listing” a species), “designate *any* habitat of such species which is then considered to be critical habitat” “to the *maximum* extent prudent and determinable.” 16 U.S.C. § 1533(a)(3)(A) (emphases added). The ESA defines “critical habitat” to include both “specific areas within the geographical area occupied by the species, at the time it is listed . . . , on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection,” *id.* § 1532(5)(A)(i); and “specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the [Service] that such areas are essential for the conservation of the species,” *id.* § 1532(5)(A)(ii).

If the Service finds critical habitat not to be “determinable” at the time it lists a species—meaning that it lacks sufficient information to identify critical habitat, 50 C.F.R.

§ 424.12(a)(2)—the Service may extend the deadline for designation of critical habitat by one year. 16 U.S.C. § 1533(b)(6)(C)(ii). By the end of that year, the Service “*must* . . . , based on

³ The Secretary of the Interior is charged with administering the Act as to terrestrial species and has delegated these responsibilities to the Service. *See Cape Hatteras Access Pres. All. v. U.S. Dep’t of the Interior*, 731 F. Supp. 2d 15, 22 (D.D.C. 2010).

such data as may be available at that time,” designate critical habitat “to the *maximum* extent prudent.”⁴ *Id.* (emphases added).

Designation of critical habitat under section 4 of the ESA is a prerequisite to core statutory protections set forth in section 7 of the Act. Section 7 requires all federal agencies to consult with the Service to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to . . . result in the destruction or adverse modification of [critical] habitat” of listed species. *Id.* § 1536(a)(2). “This process, called—in shorthand—‘consultation,’ is designed as an integral check on federal agency action, ensuring that such action does not go forward without full consideration of its effects on listed species.” *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 177-78 (D.C. Cir. 2017) (internal quotation marks omitted).

If consultation indicates that destruction or adverse modification of critical habitat is likely, “the Secretary shall suggest . . . reasonable and prudent alternatives” to the proposed action that would avoid the likely destruction or adverse modification of the critical habitat. 16 U.S.C. § 1536(b)(3)(A). 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) (citing 16 U.S.C. §§ 1536(b)(4), (g), 1538(a)). Designation of critical habitat thus imposes a

⁴ Even when designation of critical habitat would be prudent, the Service may still exclude a particular area from designation if, after considering “the economic impact, the impact on national security, and any other relevant impact, of specifying [that] particular area as critical habitat,” the Service determines that “the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.” 16 U.S.C. § 1533(b)(2); *see* 50 C.F.R. § 424.19. Because the Service determined that it would not be prudent to designate *any* critical habitat for the bee, it never reached the next step of considering whether to exclude particular areas from designation based on economic or other impacts.

crucial layer of protection to guard against loss or degradation of habitat essential to a species' conservation.

II. The “not prudent” exception to the ESA’s mandate to designate critical habitat

By requiring the Service to designate critical habitat “to the maximum extent prudent,” Congress recognized that there may be rare circumstances in which designation would not be prudent. 16 U.S.C. § 1533(b)(6)(C); *see* H.R. Rep. No. 95-1625, at 17 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 9453, 9467, 1978 WL 8486. The Service has elaborated on the application of the “not prudent” exception via regulation.

A. The 2016 Regulation

In 2016, the Service promulgated a regulation (“2016 Regulation”) providing:

(1) A designation of critical habitat is not prudent when any of the following situations exist:

(i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species; or

(ii) Such designation of critical habitat would not be beneficial to the species. In determining whether a designation would not be beneficial, the factors the Service[] may consider include but are not limited to: Whether the present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or whether any areas meet the definition of “critical habitat.”

50 C.F.R. § 424.12(a)(1) (2016); *see* 81 Fed. Reg. 7414, 7439 (Feb. 11, 2016). As the Service explained, it would be “uncommon” for designation of critical habitat to be “not prudent,” “especially given that most species are listed, in part, because of impacts to their habitat or curtailment of their range.” 81 Fed. Reg. at 7425. Most “not prudent” findings have flowed from a determination that identifying critical habitat would *increase* harm to a species. *Id.* “For example, if a species was highly prized for collection or trade, then identifying specific localities of the species could render it more vulnerable to collection and, therefore, further threaten it.” *Id.*

Less frequently, “not prudent” findings have been appropriate where a species has been “listed because of factors *other* than threats to its habitat or range, such as disease.”⁵ *Id* (emphasis added).

B. The 2019 Regulation

In 2019, the Service revised the 2016 Regulation. The amended regulation (“2019 Regulation”) provides:

(1) The [Service] may, but is not required to, determine that a designation would not be prudent in the following circumstances:

- (i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;
- (ii) The present or threatened destruction, modification, or curtailment of a species’ habitat or range is not a threat to the species, or threats to the species’ habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;
- (iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;
- (iv) No areas meet the definition of critical habitat; or
- (v) The [Service] otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.

50 C.F.R. § 424.12(a)(1); *see* RPBB0007, 40. The first four subsections of the 2019 Regulation purport to enumerate specific circumstances under which designation of critical habitat might not be prudent. 50 C.F.R. § 424.12(a)(1)(i)-(iv). In contrast, the fifth subsection of the 2019 Regulation (“catch-all provision”) apparently purports to authorize the Service to “otherwise

⁵ Here, the Service listed the bee as endangered specifically because of “high-severity stressors” *including* “[h]abitat loss and degradation.” Listing Decision, RPBB0143-44; *see infra* Factual Background II.A.

determine[]”—without limitation—that designation of critical habitat would not be prudent based on the best available science.⁶ *Id.* § 424.12(a)(1)(v).

FACTUAL BACKGROUND

I. The rusty patched bumble bee

The rusty patched bumble bee (*Bombus affinis*) is a distinctive species named for the rusty reddish patch located on the abdomen of worker and male bees. Listing Decision, RPBB0126. Unlike the honey bee, which came from Europe, the rusty patched bumble bee is native to North America. *See id.* at RPBB0127, 137, 141. The rusty patched bumble bee uses “buzz pollination,” a technique through which the bee vibrates its body to release pollen from flowers. Xerces Petition, RPBB0285. In addition to pollinating commercially important crops, the bee pollinates a wide range of native flowering plants and thereby plays a vital role in sustaining functioning native ecosystems. *Id.*; *see* Listing Decision, RPBB0141. Once the fourth most common bumble bee in the United States—with a range covering much of the Midwest and Northeastern United States, *see* Status Assessment, RPBB0213; Listing Decision, RPBB0126-27; Not-Prudent Decision, RPBB0001—the bee has experienced “marked and precipitous declines,” Status Assessment, RPBB0237. Since the 1990s, the bee has disappeared from about 87 percent of its historical range; the number of documented populations has similarly declined by at least 88 percent. Listing Decision, RPBB0144.

⁶ In a separate lawsuit, NRDC and other plaintiffs have facially challenged the 2019 Regulation on the basis that it unlawfully expands the “not prudent” exception in violation of the ESA. *See* Second Am. Compl. for Declaratory & Injunctive Relief 31, *Ctr. for Biological Diversity v. Bernhardt*, No. 4:19-cv-05206-JST (N.D. Cal. June 4, 2020), ECF No. 90; Conservation Pls.’ Refiled Mot. & Mem. for Summ. J. 11-12, *Ctr. for Biological Diversity v. Bernhardt*, No. 4:19-cv-05206-JST (N.D. Cal. Oct. 15, 2021), ECF No. 142.

A. The bee's life cycle shapes its habitat needs

The Service has extensively documented the life cycle of the rusty patched bumble bee, *id.* at RPBB0126, which informs the Service's understanding of the species' unique habitat needs. The bee is a highly social species that forms colonies comprised of a single queen, female workers, and males. *Id.* Rusty patched bumble bees are "one of the first bumble bees to emerge [from hibernation] early in the spring and the last to go into hibernation" each fall. *Id.* In early spring, solitary queens start building colonies. *Id.* Queens produce workers throughout the summer, and workers are responsible for defending the colony, caring for the young, and collecting food, namely nectar and pollen. *Id.*; Status Assessment, RPBB0180. Queens remain in the nest and continue to lay eggs, producing males and new queens from mid-summer to early fall. Listing Decision, RPBB0126. Males and new queens then disperse to mate while the remaining bees die. *Id.* New queens hibernate during the winter. *Id.* The next spring, those queens emerge and search for suitable nest sites, gather pollen and nectar from flowers to support egg production, and form new colonies. *Id.*

Consistent with the bee's life cycle, the Service has identified the particular habitat features that the bee requires. These include "areas that support sufficient food (nectar and pollen), undisturbed nesting habitat in proximity to floral resources, and overwintering habitat for hibernating queens." Not-Prudent Decision, RPBB0002. The bee "live[s] in temperate climates" and is "not likely to survive prolonged periods of high temperatures" above 95 degrees Fahrenheit. Listing Decision, RPBB0126.

When the bee emerges early in spring, it is often found near woodland habitats. Conservation Management Guidelines, RPBB0084. During the summer and fall, the bee's core foraging areas are likely those "with concentrated resources (*e.g.*, open fields and prairies with large patches of blooming native flowers) where the bee can find pollen and nectar while

minimizing energy expenditure.” *Id.* Because bumble bees do not store substantial amounts of pollen and nectar in their nests, the bee needs “a constant and diverse supply of flowers that bloom throughout the colony’s long life cycle, from April through September.” Status Assessment, RPBB0180; *see* Section 7 Guidance, RPBB0072. Floral diversity throughout the bee’s active season is especially crucial because the bee is a short-tongued species, meaning it can forage only from plant species with easily accessible nectar. Status Assessment, RPBB0180.

In addition, data suggest that worker bees usually forage within one kilometer of their nesting sites; suitable foraging habitat must, therefore, be available within relatively close proximity of nesting habitat. *Id.* The bee’s nests are usually located in abandoned rodent nests or other similar cavities one to four feet underground, although nests are occasionally found above ground too. *Id.* “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).” Conservation Management Guidelines, RPBB0083.

Although there is little direct information about the habitat of overwintering rusty patched bumble bee queens, other bumble bee species typically form underground chambers in soft soil and sometimes use decaying organic matter or mole hills when overwintering. Status Assessment, RPBB0180. The Service “assume[s] that the [rusty patched bumble bee] winters exclusively in upland forest and woodland.” Section 7 Guidance, RPBB0064. “Overwintering habitat is often in or near woodlands or woodland edges that contain spring blooming herbaceous plants, shrubs, and trees, which allows proximity to woodland spring blooming flowers, particularly spring ephemeral wildflowers, a critical early spring food source.” Conservation Management Guidelines, RPBB0084 (emphasis omitted).

In its guidance documents, the Service has outlined the bee’s habitat needs with even greater specificity. It has listed various habitat categories (e.g., upland grassland and shrubland; palustrine wetlands, excluding ponds), described the uses that the bee has for each habitat category (i.e., nesting, wintering, foraging), noted seasonal variations in the use of each habitat category (e.g., upland forest and woodland used for foraging in the spring but not summer or fall); and provided examples of discrete habitat types that fall within each habitat category (e.g., “native tallgrass prairie, including remnants and restored/reconstructed native prairie savanna; [and] pine and oak barrens” are examples of upland grassland and shrubland). Section 7 Guidance, RPBB0064 tbl. 1. The Service has summarized the bee’s habitat needs in the following table in its Section 7 Guidance:

Table 1. Seasonal uses of habitat types by the rusty patched bumble bee (RPBB). Natural or semi-natural vegetation that includes favored forage species (Table 1) typifies RPBB habitat. The species also uses flower gardens and other areas that contain nectar or pollen resources and are within foraging distance of RPBB habitats. USFWS assumes that the RPBB is present in nesting habitat between March 16 and October 14 and in wintering habitat from October 15 to March 15.

Habitat Category	Habitat Function				Examples/Notes
	Nesting	Wintering	Foraging		
			Spring	Summer/Fall	
Upland Grassland & Shrubland	X		X	X	native tallgrass prairie, including remnants and restored/reconstructed native prairie; savanna; pine and oak barrens
Upland Forest & Woodland		X	X		Maple-Basswood Forest; Oak-Hickory Forest
Upland Forest & Woodland Edges	X	X	X	X	This includes 30-meter edges of forest and woodland habitats that are adjacent to nesting and summer/fall foraging habitat.
Palustrine wetlands, excluding ponds			X	X	marsh, swamp, bog, fen, and wet meadow; forested wetlands (e.g., Silver Maple - Floodplain Forest)
Some vegetation that is not natural or semi-natural – flower gardens and similar areas (e.g., plant nurseries)			X	X	Examples of cultural vegetation that provides floral resources; accessed by RPBB from nearby natural and semi-natural areas where they may nest or overwinter

Id.; see also Section 10 Guidance, RPBB0108-11 (describing the bee’s life cycle, habitat needs, and timing of habitat use).

B. Habitat destruction and degradation are a primary cause of the bee's decline

The Service has identified “habitat loss and degradation” as one of the “primary causes” of the bee’s decline. Listing Decision, RPBB0125; *see also* Not-Prudent Decision, RPBB0003 (acknowledging that habitat loss and degradation have “established negative effects on bumble bees” generally). The bee historically occupied native grasslands across its range, but an estimated 99.9% of native grasslands in the United States has since disappeared. Status Assessment, RPBB0213. Most of this habitat loss has resulted from the conversion of land to agriculture and urbanization, but factors such as intensive livestock grazing and fire suppression have contributed as well. *Id.* Although much of the habitat conversion happened in the past, “the dramatic reduction and fragmentation of habitat have persistent and ongoing effects on the viability of [the bee’s] populations.” Listing Decision, RPBB0144; *see* Status Assessment, RPBB0213. The Service has found that remaining colonies “continue to be affected by high-severity stressors, including . . . habitat loss and degradation.” Listing Decision, RPBB0144. Among other things, the conversion of native habitats to agriculture and other uses “is still occurring today,” posing an ongoing threat to the bee. *Id.*

Another significant ongoing cause of habitat loss and degradation is the widespread use of pesticides, including herbicides, insecticides, and fungicides. Herbicides destroy and degrade the bee’s habitat by limiting food availability. Status Assessment, RPBB0214; Section 10 Guidance, RPBB0114, 118. The bee depends on nectar and pollen for food, and flowering plants may be reduced or nonexistent in and around areas where herbicides have been applied. *See* Status Assessment, RPBB0214; Section 10 Guidance, RPBB0114, 118. Herbicide use can also facilitate the growth of “invasive plant species that outcompete wildflowers.” Status Assessment, RPBB0214.

In addition, pesticides in general compromise habitat quality owing to their toxicity. *See id.* at RPBB0207-10; Section 10 Guidance, RPBB0113, 118. Pesticides can contaminate the bee’s nesting and overwintering habitat by persisting and accumulating in soils. *See* Status Assessment, RPBB0208-09. They can also contaminate the bee’s foraging habitat. In addition to leaving residues on plant surfaces, “systemic” insecticides, like the widely used neonicotinoids, are absorbed by plants—including both target and non-target plants—and secreted in nectar, pollen, and sap. *Id.*; *see also* Conservation Management Guidelines, RPBB0093 (acknowledging that “rusty patched bumble bees are unlikely to thrive if they are exposed to insecticides that are used broadly and systemically . . . or are foliar sprayed”). Bees are then exposed to these potent pesticides when they forage for pollen and nectar, and as a result suffer acute harms like paralysis and death; or subacute harms, like impaired reproductive capacity and cognition, diminished longevity, depressed feeding, and decreased ability to cope with parasites, disease, and toxins. Status Assessment, RPBB0207-08, 10. Habitat is often contaminated by multiple pesticides, and bees that rely on contaminated habitat can experience greatly magnified harm when the active and inactive ingredients found in pesticides interact synergistically with one another. *Id.* at RPBB0207, 209-10; *see* Section 10 Guidance, RPBB0113.

Notably, pesticides do not merely remain where they are applied, but rather migrate off-site via soil, water, and air. *Cf.* Status Assessment, RPBB0208-09 (describing a variety of common pesticide application methods and noting the presence of pesticide residues in “soils, waterways, field margins, and floral resources”). As a result, the impacts of pesticide contamination extend beyond treated fields to habitat in surrounding natural areas. *See, e.g.*, Status Assessment, RPBB0214 (mentioning pesticide drift from agricultural plots).

Because of their distinctive life cycle, bumble bees are likely more susceptible than honey bees to the risks posed by pesticide-contaminated habitat. *Id.* at RPBB0209; *see* Listing Decision, RPBB0129. For one month each year, bumble bees depend on individual queens to forage and form new colonies. Status Assessment, RPBB0209. The death or impairment of these queens from pesticide exposure can thus prevent entire colonies from forming. *Id.* In addition, bumble bees have much smaller colonies than honey bees; thus, death or impairment of individual bumble bee workers, as opposed to individual honey bee workers, has greater consequences for colony survival. *Id.* Furthermore, bumble bee larvae eat large quantities of unprocessed pollen and thus, compared to honey bees, are exposed to much higher levels of pesticide residues in pollen. *Id.* Bumble bees are also exposed to pesticide residues in soil because they nest underground. *Id.*; *see* Listing Decision, RPBB0140.

Habitat loss and degradation reduce the bee's population abundance, diversity, and viability. Draft Recovery Plan, RPBB0043; Status Assessment, RPBB0181, 213. "Given that several kilos of food are needed to support a single nest, . . . the amount of habitat needed to support a population is likely quite large." Status Assessment, RPBB0181. Accordingly, "small, isolated patches of habitat may not be sufficient to support healthy bee populations." *Id.* at RPBB0213. Furthermore, "[a]s small populations are inherently more vulnerable to extirpation . . . , the larger the population, the higher the likelihood of persistence over time." *Id.* at RPBB0181.

Larger populations, in turn, require more and better habitat. Rusty patched bumble bee population size depends in part on how many new queens survive over winter—which depends, in turn, on "habitat quality and quantity, specifically, quality and density of the floral resources and the proximity of these resources to nest sites and overwintering sites." *Id.* Population size is

also affected by the number of fertile males and whether the landscape is conducive to their dispersal. *Id.* The maximum dispersal distance is likely between 0.6 and 6 miles, Habitat Connectivity Model, RPBB1091, but the landscape must be “permeable and free of hazards” for males and unrelated queens to find one another and mate, Status Assessment, RPBB0181; *see* Draft Recovery Plan, RPBB0043. Connectivity between populations is crucial to maintaining genetic diversity. Status Assessment at RPBB0183. In addition, distribution of the bee’s populations across habitats spanning an array of climatic conditions “reduces the chances of all colonies failing concurrently due to poor environmental conditions, and thus, is important for long-term persistence.” *Id.*; *see also id.* at RPBB0168, 230.

Loss of habitat quantity and quality thus compromises the bee’s reproductive success. It also exacerbates the bee’s susceptibility to other ongoing threats, such as pathogens and disease. *See id.* at RPBB0214. Bees that lack sufficient habitat may suffer from nutritional deficiencies, decreasing their ability to fight off parasites and disease. *Id.* The Service has explained that “even slight changes in resource availability could have significant cumulative effects on colony development and productivity,” *id.*, and could impact “the bees’ resilience to other stressors,” Not-Prudent Decision, RPBB0004; *see also* Listing Decision, RPBB0136 (acknowledging that habitat loss may have become more of a factor in the bee’s decline as colonies have been compromised by new exposures to insecticides and pathogens).

C. Habitat management and protection are essential to the bee’s survival and recovery

The Service has found that the bee’s “severe decline” shows “no evident prospect of a natural reversal,” Listing Decision, RPBB0133, and thus, habitat management and protection are critical components of the bee’s recovery. It has observed that “recovery needs to resemble [the bee’s] natural abundance and distribution to ensure long-term persistence,” Draft Recovery Plan,

RPBB0046, and explained that “[p]opulation viability requires healthy demographics *and sufficient habitat* to support a healthy demography,” Status Assessment, RPBB0181 (emphasis added). To facilitate conservation of the bee, the Service has recommended “[p]revent[ing] further declines by protecting remaining populations *and the habitat needed to support them*” and underscored that “this is paramount.” Section 7 Guidance, RPBB0073 (emphasis added).

The Service’s Draft Recovery Plan outlines five key objectives to halt and reverse declines, and ultimately to “secur[e] the long-term viability of the species.” RPBB0045.⁷ The first objective is to “prevent[] further loss of populations,” in part by “improving quality and quantity of habitat” and “ensuring appropriate connectivity between populations.” *Id.* The fourth objective entails “[a]meliorating primary pervasive threats, including . . . habitat loss.” *Id.* The fifth is to “protect[] populations and their habitats.” *Id.* In all, three of the five objectives involve protection or restoration of habitat.

The Draft Recovery Plan also sets out broad categories of actions that are “necessary” for the bee’s recovery. *Id.* at RPBB0042, 49-50. One category is “manag[ing] and protect[ing] habitat,” such as by “maintaining, improving, and restoring overwintering, foraging, and nesting habitat,” “restoring connectivity for dispersal,” “developing and implementing habitat management plans,” “and securing permanent protection of habitat.” *Id.* at RPBB0050. Another category involves minimizing exposure to pesticides, such as “establishing buffers around populations” through “habitat restoration or land acquisition.” *Id.*

⁷ The Service released a Final Recovery Plan for the bee after it issued its Not-Prudent Decision. *See* Service, Recovery Plan for Rusty Patched Bumble Bee (*Bombus affinis*) (2021), <https://bit.ly/3CZJTcX>. Plaintiffs refer only to the Draft Recovery Plan, however, as only that version was part of the record before the Service.

Elsewhere, the Service similarly acknowledges that habitat restoration and management activities—such as “[c]reating and maintaining flowering plant habitat and overwintering sites by revegetating project areas with appropriate native seed mixes,” “timing vegetation-related maintenance activities to minimize impacts,” and “restricting pesticide and herbicide use”—“will contribute to the conservation of the rusty patched bumble bee.” Listing Decision, RPBB0133; *see also* Conservation Management Guidelines, RPBB0086-88 (providing detailed management objectives and targets for creating and maintaining high-quality habitat for the bee).

To limit pesticide contamination, the Service instructs that “the safest action is to avoid use of insecticides in rusty-patched bumble bee habitat or in areas near habitat,” Conservation Management Guidelines, RPBB0093, and that “any use of herbicides in a manner that may affect the rusty patched bumble bee should be assessed carefully to determine [if] the species could be exposed to the effects of herbicide use,” Section 10 Guidance, RPBB0114. The Service also recognizes that “[c]onservation of the rusty patched bumble bee will ultimately depend in part on connecting patches of high quality habitat,” Conservation Management Guidelines, RPBB0096, and agrees that plantings to enhance pollinator habitat “can offer foraging and breeding habitats for pollinators and may connect previously separated habitats and aid in species recovery,” Listing Decision, RPBB0131.

Habitat management and protection are especially crucial to the bee’s survival and recovery because “the species does not have the adaptive capacity in its current state to withstand physical and biological changes in the environment presently or into the future.” *Id.* at RPBB0144. This means that any further habitat degradation or loss could push the bee over the brink to extinction, and measures are needed to counter “the dramatic reduction and fragmentation of habitat [that] have persistent and ongoing effects” on the viability of the bee’s

remaining populations. *Id.*; *see also id.* (noting that “the number of remaining populations is small, most of those populations are extremely small in size . . . , and the species’ range is severely reduced”).

II. The Service’s listing and critical-habitat determinations for the rusty patched bumble bee

A. The Service listed the bee as endangered in part because of the “high-severity” stressor of habitat loss and degradation

The ESA authorizes the Service to list a species based on “the present or threatened destruction, modification, or curtailment of its habitat or range,” 16 U.S.C. § 1533, and the Service expressly cited this factor as a justification for listing the bee as an endangered species, *see* Listing Decision, RPBB0143-44. Among other things, the Service found that “the dramatic reduction and fragmentation of habitat have persistent and ongoing effects on the viability of [the bee’s remaining] populations”; that “conversion of native habitats to agriculture . . . or other uses is still occurring today”; that “herbicide use occurs rangewide and can reduce available floral resources”; and that the bee “is not able to naturally recolonize unoccupied areas that are not connected by suitable dispersal habitat.” *Id.* at RPBB0144; *see also id.* at RPBB0128 (acknowledging that many of the bee’s existing populations “continue to face the effects of . . . habitat loss”).

The Service determined that “[t]he risk of extinction is currently high” and reported that “optimistic modeling suggests that all but one of the [six] ecoregions [in which the bee remains] are predicted to be extirpated within 5 years.” *Id.* at RPBB0144. As the Service explained, “losses in both the number of populations and spatial extent render the rusty patched bumble bee vulnerable to extinction even without further external stressors (*e.g.*, habitat loss, insecticide exposure) acting upon the species.” *Id.* at RPBB0127. The bee’s remaining colonies “lack[] the ability to withstand physical and biological changes” yet “continue to be affected by high-

severity stressors including . . . habitat loss and degradation . . . throughout all of the species' range." *Id.* at RPBB0144.

Regarding critical habitat, the Service's Listing Decision acknowledged that, "in the absence of finding that the designation of critical habitat would increase threats to the species, if there are benefits to the species from a critical habitat designation, a finding that designation is prudent is warranted." *Id.* at RPBB0145. The Service observed it was unaware of any harmful impacts from designation and identified four "potential benefits of designation": "(1) Triggering consultation under section 7 of the Act . . . ; (2) focusing conservation activities on the most essential features and areas; (3) providing educational benefits to State or county governments or private entities; and (4) preventing people from causing inadvertent harm to the protected species." *Id.* Nevertheless, the Service found "designation of critical habitat to be not determinable at this time," *id.* at RPBB0146, thereby invoking the ESA's provision allowing the Service one additional year to designate critical habitat. *See* 16 U.S.C. § 1533(b)(6)(C)(ii).

B. The Service nonetheless determined that designation of critical habitat would be "not prudent"

Eventually, in September 2020—more than three-and-a-half years after it listed the bee as endangered, more than two-and-a-half years after its statutory deadline for issuing a final rule on critical habitat, and after multiple rounds of litigation challenging the Service's delays, *see supra* pages 2-3—the Service published its final critical-habitat determination. Not-Prudent Decision, RPBB0001. In contrast with its Listing Decision, which recognized that "habitat loss and degradation" are a leading cause of the bee's decline, RPBB0125, and that designation of critical habitat "may be prudent," RPBB0145, the Service's final determination concluded that designation would be "not prudent," Not-Prudent Decision, RPBB0004-05. The Service's

determination consisted of two alternative parts, referred to here as the “Catch-All Determination” and the “No-Benefit Determination.”

In its Catch-All Determination, the Service relied on the 2019 Regulation, *see id.* at RPBB0004—which had come into effect while the Service unlawfully delayed its final determination on the bee’s critical habitat. The 2019 Regulation had purportedly expanded the Service’s longstanding interpretation of the ESA’s “not prudent” exception, *see supra* Statutory and Regulatory Framework II.B, and the Service then invoked the 2019 Regulation’s new catch-all provision to conclude that, “pursuant to 50 CFR 424.12(a)(1)(v),” designation of critical habitat was not prudent because: (1) “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”; (2) “availability of habitat does not limit the conservation of the rusty patched bumble bee now, nor will it in the future”; and (3) the Service “cannot predict which specific areas rusty patched bumble bees may occupy at a landscape level across its historic range.” Not-Prudent Decision, RPBB0004.

The Service went on to profess uncertainty as to whether the 2019 Regulation applied to this determination at all. *Id.* In the alternative, therefore, the Service rendered its No-Benefit Determination based on the 2016 Regulation, concluding that designation of critical habitat would not be prudent because it would not benefit the species. *Id.* at RPBB0004 (citing 50 C.F.R. § 424.12(a)(1) (2016)). The Service advanced three assertions that purportedly supported its No-Benefit Determination (the first two of which the Service also used to support its Catch-All Determination): (1) “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”; (2) “the availability of habitat does not limit the conservation of the rusty patched bumble bee now, nor

will it in the future”; and (3) section 7 consultation for unoccupied habitat is not necessary, and the Service has “achieved, through development of the priority maps, the other benefits of critical habitat that we had identified in the final listing rule [i.e., benefits other than section 7 consultation].” *Id.* The “other benefits” that the Service had identified included “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.*

Plaintiffs now challenge the Service’s decision not to designate critical habitat for the bee as inconsistent with the statute and contrary to the record.

STANDARD OF REVIEW

Plaintiffs challenge the Service’s failure to designate critical habitat for the rusty patched bumble bee under the ESA and APA. Review of an agency’s compliance with both section 4 of the ESA and the APA is governed by the APA’s standard of review. *See* 5 U.S.C. § 706; *Cabinet Mountains Wilderness/Scotchman’s Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 685-86 (D.C. Cir. 1982); *Bldg. Indus. Ass’n of Superior Cal. v. Babbitt*, 979 F. Supp. 893, 898, 905-06 (D.D.C. 1997). When reviewing agency action under the APA, courts must “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2). While the APA does “not empower[] [courts] to substitute [their] judgment for that of the agency,” it does require “a thorough, probing, in-depth review” of challenged decisions. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971).

To comply with the APA, an “agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*,

463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Agency action violates the APA when the agency

has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 43; *see also Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 59 (D.C. Cir. 2015)

(explaining that internal inconsistency or inadequate explanation renders agency action arbitrary and capricious).

Summary judgment should be granted if “there is no genuine dispute as to any material fact” and the moving party “is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).

ARGUMENT

The Service’s failure to designate critical habitat for the rusty patched bumble bee violates the ESA’s command to designate critical habitat to “the maximum extent prudent,” 16 U.S.C. § 1533(b)(6)(C), and is untethered from record evidence showing that designation of critical habitat is both feasible and crucial to the bee’s conservation. As an initial matter, while the Service did not take a position on which version of its regulation applies, its critical-habitat determination for the rusty patched bumble bee is governed by the 2016 Regulation, not the 2019 Regulation. *See infra* Argument I. But regardless of which version applies, the Service’s No-Benefit Determination and Catch-All Determination are both contrary to the ESA and unsupported by the record. *See infra* Argument II, III. The Service’s decision not to designate critical habitat must be set aside as “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

I. Although the Service did not take a position on whether the 2016 Regulation or 2019 Regulation applies to its Not-Prudent Decision, the 2016 Regulation applies

As an initial matter, the Service expressed uncertainty as to whether the 2016 Regulation or 2019 Regulation applies to its critical-habitat determination. Not-Prudent Decision, RPBB0004. The Service, therefore, proffered alternative determinations supporting its decision under each version of the regulation. *Id.*; *see supra* Factual Background II.B, at pp. 20-21 (describing the “No-Benefit Determination” applying the 2016 Regulation and the “Catch-All Determination” applying the 2019 Regulation). Ultimately, because the Service’s alternative determinations are both contrary to the statute and unsupported by reasoned explanation, the Not-Prudent Decision must be set aside regardless of which version of the regulation applies. *See infra* Argument II, III. But, for purposes of clarity, Plaintiffs here explain that the Service should have applied the 2016 Regulation—not the 2019 Regulation.

When the Service issued its Proposed Listing Decision in 2016, it acknowledged—citing the 2016 Regulation—that “if there are benefits to the species from a critical habitat designation, a finding that designation is prudent is warranted.” RPBB0161-62. The following year, when the Service issued its Listing Decision, it reaffirmed—again citing the 2016 Regulation—that “in the absence of finding that the designation of critical habitat would increase threats to the species, if there are benefits to the species from a critical habitat designation, a finding that designation is prudent is warranted.” RPBB0145. But the Service did not actually finalize its critical habitat determination until years later—after invoking the statutory one-year extension, missing that deadline, and being sued. *See supra* p. 2 and note 2. In the interim, the Service promulgated the 2019 Regulation, which purported to reinterpret the ESA’s “not prudent” standard. When the Service eventually issued its Not-Prudent Decision, it conceded that it was unsure whether the newly promulgated 2019 Regulation governs its analysis. RPBB0004.

By its own terms, the 2019 Regulation became “effective on September 26, 2019,” and “appl[ies] only to relevant rulemakings for which the *proposed rule* is published *after* that date.” Preamble to 2019 Regulation, RPBB0007 (emphases added). “Thus, the [2016 Regulation] . . . continue[s] to apply to any rulemakings for which a *proposed rule* was published *before* the effective date of this rule.” *Id.* (emphases added). These terms prevent a situation where the public was given notice of, and opportunity to comment on, a proposed determination applying the 2016 Regulation, only to have the Service later publish a final determination applying the 2019 Regulation.

Here, the Service published a “proposed rule” with respect to its critical-habitat determination *before* the 2019 Regulation took effect. Specifically, in its “proposed rule,” issued on September 22, 2016, the Service not only proposed listing the bee, but also explained the potential benefits of designating critical habitat, made a preliminary determination that designation “may be prudent,” and solicited comments regarding critical habitat. Proposed Listing Decision, RPBB0155, 162; *see id.* at RPBB0155 (soliciting comments “concerning this proposed rule” and “particularly seek[ing] comments concerning,” among other things, “reasons why any habitat should or should not be determined to be critical habitat” for the bee). Although the Service reversed course in its final determination, *see* Not-Prudent Decision, RPBB0004-05, that does not negate the Service’s issuance of its proposed rule before September 26, 2019.

If the Court agrees, then it need only consider the Service’s No-Benefit Determination applying the 2016 Regulation in deciding whether the Not-Prudent Decision is lawful—and that determination is invalid for the reasons discussed below in Argument II. Even if the 2019 Regulation were relevant here, however, the Service’s Catch-All Determination applying the 2019 Regulation fails for similar reasons, as discussed below in Argument III. Ultimately, it is of

little practical significance which version of the regulation applies because both the Service's No-Benefit Determination and its Catch-All Determination suffer from similar legal deficiencies.

II. The Service's No-Benefit Determination violates the ESA and APA

Applying the 2016 Regulation, the Service concluded that designating critical habitat for the rusty patched bumble bee would not be prudent because it "would not be beneficial for the [bee]." Not-Prudent Decision, RPBB0004. The Service made three assertions that purportedly support its No-Benefit Determination: (1) that habitat loss and degradation are not "the" primary threat to the bee; (2) that the availability of habitat does not, and will not, limit the bee's conservation; and (3) that "triggering section 7 consultation in unoccupied habitat is not necessary," and the Service has "achieved, through development of the priority maps, the other benefits of critical habitat that [the Service] had identified in the final listing rule." *Id.* Each of these assertions is "arbitrary, capricious . . . [and] not in accordance with" the ESA. 5 U.S.C. § 706(2)(A).

A. The Service misapplied the ESA's "not prudent" exception

The No-Benefit Determination is contrary to the ESA, which authorizes the Service to decline designation of critical habitat as "not prudent" only in narrow circumstances when designation would not benefit a species. While the Service invoked the appropriate "no benefit" standard as elaborated in the 2016 Regulation, the Service applied the standard in a way that unlawfully expands the narrow "not prudent" exception far beyond its statutory and regulatory limits.

1. The ESA authorizes the Service to withhold critical habitat as "not prudent" only in narrow circumstances when designation would not benefit a species

Section 4 of the ESA requires the Service to designate critical habitat unless doing so would not be prudent. This exception is limited to rare circumstances in which designation

would not benefit a species. This is apparent from the statute’s language, purpose, and history. *See Genus Med. Techs. LLC v. U.S. Food & Drug Admin.*, 994 F.3d 631, 637 (D.C. Cir. 2021).

To begin with the text, the ESA commands the Service to designate critical habitat to the “maximum extent prudent.” 16 U.S.C. § 1533(b)(6)(C). In ordinary usage, a “prudent” approach towards species conservation is a precautionary one that seeks to avoid risks to species while carefully providing for their future. *See* Cambridge Dictionary (online ed. 2021) (defining “prudent” to mean “careful and avoiding risks”); Webster’s Third New International Dictionary (1976) (“circumspect (as in conduct): discreet, cautious”); The Random House Dictionary of the English Language (1969) (“wisely cautious in practical affairs,” “circumspect,” and “careful in providing for the future”).

Congress did not, however, direct the Service to approach critical-habitat designation with mere prudence. Rather, it required the Service to designate critical habitat for endangered species to “the *maximum extent* prudent.” 16 U.S.C. § 1533(b)(6)(C) (emphasis added). As the Supreme Court has instructed, “Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as ‘institutionalized caution.’” *Tenn. Valley Auth.*, 437 U.S. at 194. An expansive interpretation of the “not prudent” exception, therefore, would be inconsistent with the precautionary approach prescribed by Congress: one that is intended to avoid risks to species to the “maximum extent.” 16 U.S.C. § 1533(b)(6)(C).

Congress’s objectives in passing the ESA—expressly stated in the Act itself—also support such a narrow interpretation of the “not prudent” exception. One of the ESA’s primary purposes is to “provide a means whereby the *ecosystems* upon which endangered species and threatened species depend may be conserved.” *Id.* § 1531(b) (emphasis added). In addition,

Congress specifically defined “conserve” to mean “to use . . . *all methods and procedures which are necessary* to bring any [listed] species to the point at which the measures provided pursuant to this chapter are no longer necessary,” including “habitat acquisition and maintenance.” *Id.* § 1532(3) (emphasis added). Where designating critical habitat would benefit a species, withholding such designation undermines Congress’s directive to use all methods and procedures necessary to protect listed species and the ecosystems on which they depend.

The legislative history of the ESA confirms that the “not prudent” exception is strictly limited to rare circumstances where designation of critical habitat would not benefit listed species. The “not prudent” exception is reserved for “rare circumstances where the specification of critical habitat . . . would not be beneficial to the species.” H.R. Rep. No. 95-1625, at 17, 1978 WL 8486; *see also* S. Rep. No. 106-126, at 10 (1999), 1999 WL 33592886 (underscoring that the Service’s authority to “determine that designation is not prudent . . . is to be exercised only in rare situations”). In other words, it is to be applied where designation “would not be in the best interests of the species.” H.R. Rep. No. 95-1625, at 16, 1978 WL 8486; *see also* *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. Or. Nat. Res. Council*, 490 U.S. 360 (1989); *NRDC v. U.S. Dep’t of the Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997) (“The fact that Congress intended the imprudence exception to be a narrow one is clear from the legislative history.”); *N. Spotted Owl v. Lujan*, 758 F. Supp. 621, 626 (W.D. Wash. 1991) (“This legislative history leaves little room for doubt regarding the intent of Congress: The designation of critical habitat is to coincide with the final listing decision absent extraordinary circumstances.”).

Accordingly, courts have invalidated “not prudent” determinations and regulatory provisions that effectively broadened the statutory exception. *See, e.g., NRDC v. U.S. Dep’t of the Interior*, 113 F.3d at 1126 (rejecting the Service’s extension of the “not prudent” exception to situations where designation would not benefit *most* of a species, explaining that this “contravene[d] the clear congressional intent that the imprudence exception be a rare exception”); *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 443 & nn.57-59 (5th Cir. 2001) (invalidating regulatory definition that made it more likely that the Service would find designation of critical habitat to be “not prudent,” explaining that this was “in tension with the avowed intent of Congress that a ‘not prudent’ finding regarding critical habitat would only occur under ‘rare’ or ‘limited’ circumstances”); *Conservation Council for Haw. v. Babbitt*, 2 F. Supp. 2d 1280, 1284 (D. Haw. 1998) (stating that “[t]he ESA . . . establishes a general rule that designation should be made unless there is evidence that such a designation is not beneficial” and reversing the Service’s “not prudent” determination given its failure to provide any evidence that designation of critical habitat would harm listed plants by, for example, increasing collection or vandalism).

The Service’s own 2016 Regulation, too, reflects this narrow reading of the “not prudent” exception, equating “not prudent” with “no benefit.” *See* 81 Fed. Reg. at 7425 (“[I]t is permissible . . . to determine that designating critical habitat for a species is not beneficial and, therefore, not prudent.”). Designation of critical habitat might be “not beneficial” if identifying critical habitat would *increase* threats to a species—for example, “if a species was highly prized for collection or trade” and “identifying specific localities of the species could render it more vulnerable to collection.” *Id.* Less frequently, “not prudent” findings may be appropriate where a species has been “listed because of factors *other* than threats to its habitat or range, such as

disease,” and habitat protection would yield no benefit. *Id.* (emphasis added). But the 2016 Regulation cautions that “not prudent” determinations are “uncommon, especially given that most species are listed, in part, because of impacts to their habitat,” *id.*—as was the rusty patched bumble bee. In its Listing Decision, the Service specifically “f[ou]nd” that “habitat loss and degradation” are one of “the primary contributing factors to the declines of the rusty patched bumble bee.” Listing Decision, RPBB0138; *see id.* at RPBB0143-44. Thus, “in the absence of finding that the designation of critical habitat would increase threats to the species, if there are benefits to the species from a critical habitat designation, a finding that designation is prudent is warranted.” *Id.* at RPBB0145.

2. The Service withheld critical habitat as “not prudent” for reasons that, on their face, fail to establish a lack of benefit for the bee

Although the Service purported to apply the “no benefit” standard prescribed by the ESA and reflected in the 2016 Regulation, it proffered three assertions that, on their face, fail to show that critical habitat would not actually benefit the bee.

First, the Service claims that habitat loss and degradation are not “the” primary threat to the bee. Not-Prudent Decision, RPBB0004. Even if that were true (*but see infra* Argument II.B), it would not mean that designating critical habitat would not benefit the bee. This is especially so where the Service has previously acknowledged that habitat loss and degradation are a “primary cause[.]” of the bee’s decline, Listing Decision, RPBB0125, and that habitat protection is a “necessary” component of the species’ recovery, Draft Recovery Plan, RPBB0049-50. Allowing the Service to apply the “not prudent” exception simply because habitat loss and degradation are not “the” primary threat to a species would expand the exception far beyond what the ESA allows.

The Ninth Circuit in *NRDC v. U.S. Department of the Interior* rejected an analogous rationale underlying the Service’s “not prudent” determination for the coastal California gnatcatcher, reasoning that it was incompatible with Congress’s design that such findings should be rare. 113 F.3d at 1126. The Service determined that designation would not be beneficial because *most* gnatcatcher populations were “found on private lands to which section 7’s consultation requirement would not apply.” *Id.* at 1125 (citation omitted). The court rejected this justification, stating: “By rewriting its ‘beneficial to the species’ test for prudence into a ‘beneficial to *most of the species*’ requirement, the Service expands the narrow statutory exception for imprudent designations into a broad exemption for imperfect designations. This expansive construction . . . is inconsistent with clear congressional intent.” *Id.* at 1126.

The Service makes a nearly identical mistake here by expanding the “not prudent” exception well beyond the narrow scope prescribed by Congress. Whereas the 2016 Regulation provides that designation might not be prudent where habitat destruction and modification are “not *a* threat” to the species, 81 Fed. Reg. at 7432 (emphasis added), the Service’s Not-Prudent Decision asserts that designation would not be prudent because habitat loss and degradation are not “*the* primary threat” to the bee, RPBB0001 (emphasis added). If the Service could decline to designate critical habitat simply or partially because habitat loss and degradation are not “the” primary threat to a species, then “not prudent” findings might no longer be the “rare exception,” *NRDC v. U.S. Dep’t of the Interior*, 113 F.3d at 1126; *see Sierra Club*, 245 F.3d at 443, that Congress meant them to be. In fact, the Service’s interpretation would make it easier to deny critical habitat to species facing a “combination of multiple threats,” which are “likely more harmful than a single threat acting alone,” Listing Decision, RPBB0138—meaning, perversely, that the more seriously imperiled a species is, the fewer protections it gets.

Second, the Service asserts that the “availability of habitat does not limit the [bee’s] conservation” because ample habitat exists across the bee’s historic range and the bee is “flexible with regard to its habitat use.” Not-Prudent Decision, RPBB0004. Even if true (*but see infra* Argument II.B), this would not mean that designating and protecting specific, important areas of habitat would not benefit remaining populations of the bee. In other words, even assuming the bee *can* use many different areas of habitat, not all habitat is created equal; some areas of habitat may be more conducive to supporting the bee’s survival and recovery. These areas may include, for example, areas currently occupied by the bee, areas free of pesticides, areas with high floral diversity, and geographic corridors that would allow presently isolated populations of the bee to connect with one another. *See supra* Factual Background I.A-B. Furthermore, even if there were plenty of habitat across the bee’s *historic* range, much of this habitat may not be accessible to *current* populations of the bee owing to distance or geographic barriers. *See* Status Assessment, RPBB0181 (noting that dispersal corridors for the bee tend to be limited to 0.6 miles and must be “permeable and free of hazards”); Habitat Connectivity Model, RPBB1091 (explaining that the maximum dispersal distance for the bee is likely 0.6 to 6 miles). The Service’s vague assertion that ample habitat is generally available across the bee’s historic range and that the bee’s habitat needs are “flexible” thus sheds no light on whether protecting specific areas would benefit the bee.

Third, the Service asserts that “section 7 consultation in unoccupied areas is not necessary.” Not-Prudent Decision, RPBB0004. Even assuming this were correct (*but see infra* Argument II.B), the Service’s myopic focus on the purported lack of benefit from consultation regarding *unoccupied* habitat completely ignores the likelihood that consultation regarding *occupied* habitat would benefit the bee. *See* 16 U.S.C. § 1536(a)(2) (requiring interagency

consultation to “insure” that federal agency action is not likely to destroy or adversely modify critical habitat); *id.* § 1532(5)(A) (including *both* occupied and unoccupied areas in the definition of “critical habitat”).

Rather than considering the benefits of consultation in guarding against “the destruction or adverse modification” of critical habitat, *id.* § 1536(a)(2), the Service focuses on the “other benefits” of designation, asserting that it has already achieved those benefits through the “priority maps” it developed. Not-Prudent Decision, RPBB0004. But those “priority maps” do not confer any *mandatory* safeguards for the bee’s habitat; rather, they provide *voluntary* guidance that may inform conservation efforts by private actors and federal agencies. *See* Section 7 Guidance, RPBB0058; Section 10 Guidance, RPBB0101-05, 115-16. Regardless of whether the “priority maps” provide the “other,” ancillary benefits that the Service claims, the ESA does not permit such voluntary guidance to substitute for the mandatory protections contemplated by the section 7 consultation process. *See NRDC v. U.S. Dep’t of the Interior*, 113 F.3d at 1126-27 (holding 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”).

B. The Service failed to explain how its No-Benefit Determination is supported by the record

In addition to failing, on its face, to establish a lack of benefit for the bee, the Service’s No-Benefit Determination is also unlawful because the Service fails to explain how its three underlying assertions are supported by the record. *See State Farm*, 463 U.S. at 43 (holding that agency action is arbitrary and capricious if the agency fails to “articulate . . . a ‘rational connection between the facts found and the choice made’” or offers an “explanation . . . that runs counter to the evidence before the agency” (quoting *Burlington Truck Lines*, 371 U.S. at 168)).

In short, the record not only indicates that critical-habitat designation is *feasible*, but also contains abundant evidence that habitat protection and management are *crucial* to the bee's survival and recovery.

First, the Service's assertion that habitat loss and degradation is not "the" primary threat to the bee—even assuming that were legally relevant, which it is not, *see supra* Argument II.A—lacks support in the record. The Service identifies "pesticides," as ostensibly distinct from habitat loss and degradation, as one of "the" primary stressors for the bee. Not-Prudent Decision, RPBB0004. But that semantic distinction does not withstand scrutiny. In particular, the record establishes that pesticides often harm the bee precisely *by destroying or degrading the bee's habitat*. *See supra* Factual Background I.B; *see, e.g.*, Status Assessment, RPBB0207 ("[H]erbicides reduce available floral resources, thus indirectly affecting bumble bees."); *id.* at RPBB0208 (stating that "[n]eonicotinoids persist and accumulate in soils, and owing to their systemic property, are found in nectar and pollen of treated crops and landscapes . . . and in guttation droplets," which are liquid droplets exuded from the leaves of plants); *see also id.* at RPBB0183 tbl.2.2 (describing "floral resources" as an element of the bee's habitat); Listing Rule, RPBB0126 ("The species requires areas that support sufficient food (nectar and pollen from diverse and abundant flowers) . . ."). The distinction that the Service attempts to draw between pesticide exposure, on the one hand, and habitat loss and degradation, on the other, is thus arbitrary and unsupported by the record.

The Service also fails to explain why designating critical habitat would not abate the acknowledged threat of pesticide exposure. Indeed, the Environmental Protection Agency, in consultation with the Service, is responsible for ensuring that pesticide approvals do not destroy or adversely modify the critical habitat of listed species. *See* 16 U.S.C. § 1536(a)(2); *Wash.*

Toxics Coal. v. EPA, 413 F.3d 1024, 1032 (9th Cir. 2005) (holding that section 7 consultation applies to registration of pesticides), *abrogated on other grounds as recognized by Cottonwood Env'tl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1089-91 (9th Cir. 2015). For this added reason, it was arbitrary and capricious for the Service to withhold critical habitat on the unsupported basis that pesticide exposure is somehow entirely separate from habitat loss and degradation.

Second, the record contradicts the Service's claim that "the availability of habitat does not limit the conservation of the rusty patched bumble bee now, nor will it in the future." Not-Prudent Decision, RPBB0004. This claim is directly contrary to the Service's finding in the Listing Decision that "[t]he present or threatened destruction, modification, or curtailment of [the species'] habitat or range" was a reason for listing the bee as an endangered species. Listing Decision, RPBB0143; *see id.* at RPBB0143-44. More specifically, the Service concluded that habitat loss and degradation had been, and remained, a significant threat to the bee. For example, the Listing Decision identified "habitat loss and degradation" as one of the "primary causes attributed to the decline" of the bee, observing that the "dramatic reduction and fragmentation of habitat have persistent and ongoing effects on the viability of [the bee's] populations" and that conversion of the bee's native habitat "to agriculture . . . or other uses is still occurring today." *Id.* at RPBB0125, 144. Similarly, the Service found that the bee's few remaining colonies "continue to be affected by high-severity stressors, including . . . habitat loss and degradation." *Id.* at RPBB0144. Furthermore, 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," *id.*, means that any further destruction or degradation of the bee's habitat could drive the species to extinction. In the Not-Prudent Decision, the Service reaffirmed that "habitat loss has

established negative effects on bumble bees.” Not-Prudent Decision, RPBB0003. Consistent with these findings, the Service itself has acknowledged that habitat protection and management are “necessary” to the bee’s protection and recovery. Draft Recovery Plan, RPBB0042, 49-50.

In its Not-Prudent Decision, the Service vaguely asserts that it “ha[s] re-evaluated whether critical habitat designation is prudent” based on “new information that has become available since the time of listing” and “more complete data” providing “a better understanding of the life-history needs of the rusty patched bumble bee.” RPBB0002. To the extent the Service is alluding to its novel assertion that the bee is a “habitat generalist” that “is considered to be flexible with regard to its habitat use for foraging, nesting, and overwintering,” *id.* at RPBB0002, RPBB0004, the record contradicts this assertion. In fact, the record is replete with information about specific types of habitat the bee needs at specific times during its life cycle. *See supra* Factual Background I.A, at pp. 9-11. Nowhere in the Not-Prudent Decision does the Service repudiate this information. That the bee has been found in “a variety of habitats,” Not-Prudent Decision, RPBB0002, does not mean that those habitats are uniformly adequate to support the bee’s specialized needs. *See, e.g.*, Listing Rule, 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”). The record also shows that different habitats serve different functions throughout the bee’s complex life cycle; availability of just one habitat type would not be enough to sustain the bee. *See supra* Factual Background I.A, at pp. 9-11. In other words, the record indicates that the bee is not a “habitat generalist,” but a species that instead requires a diversity of habitats.

Notably, the Not-Prudent Decision mentions two documents that the Service recently released—after publishing its Listing Decision—that “provide guidance for improving or

maintaining nesting habitat, floral resources, and overwintering habitat” for the bee. Not-Prudent Decision, RPBB0003. One of these documents, the Draft Recovery Plan, “recommends habitat restoration and enhancement because even slight improvements in resource availability could increase development and productivity at existing colonies and improve the bees’ resilience to other stressors.” *Id.* at RPBB0004. If habitat restoration and enhancement are “necessary” to the bee’s conservation, as the Draft Recovery Plan states, RPBB0042, 49-50, it cannot be that habitat availability does not, and will not, limit the bee’s recovery, Not-Prudent Decision, RPBB0004. The Service never explains this fundamental mismatch between the record evidence and its conclusion.

The record also reflects that different habitat areas vary in terms of quality and utility for the bee. Even if habitat is generally available, the availability of specific types of areas is vitally important for remaining populations. For example, the bee cannot travel long distances to find suitable habitat to expand its range, so suitable habitat must be protected around currently occupied areas to allow corridors for the bee’s expansion and recovery. *See* Habitat Connectivity Model, RPBB1091 (noting that the bee’s maximum dispersal distance is likely 0.6 to 6 miles); *see also* Status Assessment, RPBB0181 (discussing characteristics of suitable dispersal habitat). The importance of currently occupied habitat is also intuitive. Even if displaced bees could find other suitable areas—a factor that depends on adjacent dispersal corridors—the record highlights the serious costs to the bee of having to locate substitute habitat. *See, e.g.*, Listing Decision, RPBB0125 (“[I]f the bumble bees must expend more energy and time to find food, they are less healthy overall, and thus less resilient to other stressors [such as] parasite infection . . . or . . . pesticides.”). And the Service’s conclusion that pesticide use is one of the “primary drivers” of the bee’s decline suggests that suitable areas with limited or no pesticide contamination are rare

and especially important for the bee. Not-Prudent Decision, RPBB0004. The record demonstrates that availability of select areas *is* limiting the bee’s conservation, and the Service fails to explain why it would not benefit the bee to designate such areas as critical habitat.

Third, the Service’s assertion that “section 7 consultation in unoccupied areas is not necessary,” Not-Prudent Decision, RPBB0004, is not supported by the record. Notably, the Service offers no explanation whatsoever for this assertion. *See Columbia Gas Transmission Corp. v. FERC*, 448 F.3d 382, 387 (D.C. Cir. 2006) (“[A] conclusion supported ‘with no explanation’ is the epitome of ‘arbitrary and capricious’ decisionmaking” (quoting *Commc’ns & Control, Inc. v. FCC*, 374 F.3d 1329, 1335-36 (D.C. Cir. 2004))). The Service’s silence is especially puzzling given the ESA’s mandate for interagency consultation to “insure” that proposed federal action is not likely to cause “the destruction or adverse modification” of critical habitat *generally*—that is, regardless of whether critical habitat is occupied or unoccupied. *See* 16 U.S.C. §§ 1532(5)(A), 1536(a)(2). In fact, the Service has observed that the bee’s recovery depends, in part, on its ability to recolonize currently unoccupied habitat. *See* Draft Recovery Plan, RPBB0046. This recolonization depends on the availability of “suitable dispersal habitat,” Listing Decision, RPBB0144, which is by definition currently unoccupied. The record thus indicates that, if suitable areas of unoccupied habitat are destroyed or adversely modified in the absence of interagency consultation, this would further compromise the bee’s recovery. More generally, the Service fails to reconcile its assertion that consultation would not benefit the bee with its own findings, throughout the record, that protection of habitat—both occupied and unoccupied—*would*, in fact, benefit the bee. *See supra* Factual Background I.B, C.

Section 7 consultation would undoubtedly help accomplish this needed habitat protection. If consultation indicates that destruction or adverse modification of critical habitat is likely, “the

Secretary shall suggest . . . reasonable and prudent alternatives” to the proposed action. 16 U.S.C. § 1536(b)(3)(A). Reasonable and prudent alternatives could include measures to protect and manage habitat. Based on the Service’s own findings, such measures would help counteract the effects of habitat loss and degradation, which continue to drive the bee towards extinction. *See supra* Factual Background I.B, C. The Service’s unexplained assertion that section 7 consultation would not benefit the bee cannot be squared with the record.

* * *

In sum, the language, purpose, and legislative history of the ESA all demonstrate Congress’s mandate to foreclose application of the “not prudent” exception unless designation of critical habitat would yield no benefit to a species. The Service itself recognized as much in its 2016 Regulation. And yet the Service declined to designate habitat for the rusty patched bumble bee based on three assertions that, individually and collectively, fail to establish a lack of benefit for the bee. In doing so, the Service defied Congress’s directive and its own regulation. *See District of Columbia v. Dep’t of Lab.*, 819 F.3d 444, 453 n.6 (D.C. Cir. 2016) (“[T]he Department’s reading of its regulation is not reasonable. It would vastly expand the coverage of the regulation—and indeed would stretch the regulation beyond what the statute can reasonably bear. Put simply, the interpretation that the Department offers to this Court is inconsistent with the regulation, and if adopted would make the regulation inconsistent with the statute.” (citations omitted)). Although there may be situations where it would be difficult to discern benefit from the designation of critical habitat, this is not one of them. On the contrary, the record here is replete with evidence that critical habitat would, in fact, benefit the bee.

Notably, nothing in the No-Benefit Determination suggests that the Service’s three assertions are alternative grounds that would each independently support its ultimate decision.

The Service “has not afforded individual weight” to those grounds, and there is no indication that the Service “would clearly have acted on [any one] ground even if the other[s] were unavailable.” *See Fogo De Chao (Holdings) Inc. v. U.S. Dep’t of Homeland Sec.*, 769 F.3d 1127, 1149 (D.C. Cir. 2003). Accordingly, if the Court concludes that any of these assertions is unlawful, the No-Benefit Determination must be set aside.

III. The Service’s Catch-All Determination violates the ESA and APA

If the Court agrees that the Service’s determination is governed by the 2016 Regulation, *see supra* Argument I, it need not consider the Service’s separate rationale under the 2019 Regulation. Nevertheless, assuming *arguendo* that the 2019 Regulation applies here, the Service’s Catch-All Determination applying the 2019 Regulation is also arbitrary, capricious, and contrary to the ESA.

As with its No-Benefit Determination, the Service provided three assertions in support of its Catch-All Determination—each of which is unlawful. *See Not-Prudent Decision*, RPBB0004 (citing 50 C.F.R. § 424.12(a)(1)(v)). The first two of the Service’s assertions—(1) that habitat loss and degradation are not “the” primary threat to the bee, and (2) that the availability of habitat does not, and will not, limit the bee’s conservation—are identical to two of the assertions underlying the Service’s No-Benefit Determination, *see id.*, and they are unlawful for the same reasons explained above. First, the ESA required the Service to designate critical habitat absent rare circumstances in which doing so would not benefit the bee. Neither assertion, even if true, would establish such a lack of benefit. *See supra* Argument II.A.2. The Service may not rely on the 2019 Regulation to circumvent the statutory “no-benefit” standard for not-prudent determinations. *See U.S. Postal Serv. v. Postal Regul. Comm’n*, 886 F.3d 1261, 1271 (D.C. Cir. 2018) (explaining that an agency “cannot use its own regulations to expand its statutory

authority”). Second, even setting that legal defect aside, these assertions are unsupported by the record. *See supra* Argument II.B.

The Service also offers a third, novel assertion in support of its Catch-All Determination: that it is unable to “predict” what areas the bee will occupy “at a landscape level.” Not-Prudent Decision, RPBB0004. But this assertion is legally irrelevant because the statute prohibits the Service—at this stage in the designation process—from withholding critical habitat on the basis of incomplete information. The ESA recognizes that critical habitat may not be “determinable” *at the time of listing*. 16 U.S.C. § 1533(a)(3)(A), (b)(6)(C)(ii). When that is the case, the Service may take “one additional year,” and no more, to gather information. *Id.* § 1533(b)(6)(C)(ii). At the end of that additional year, it is “pencils-down” time for the Service: the ESA commands it to “publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.” *Id.* There is no longer any room in the statute for a “not determinable” finding. *Id.*

The time has now passed for the Service to find that critical habitat is “not determinable.” It may not now decline to designate critical habitat for the bee by disguising a “not determinable” finding as a “not prudent” finding. Notwithstanding any uncertainty in the Service’s prediction, the ESA—consistent with its policy of “institutionalized caution,” *Tenn. Valley Auth.*, 437 U.S. at 194—requires the Service to act based on “such data as may be available at that time.” 16 U.S.C. § 1533(b)(6)(C)(ii); *see id.* § 1533(b)(2) (requiring the Service generally to designate habitat “on the basis of the best scientific and commercial data available”); *cf. In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 794 F. Supp. 2d 65, 106 (D.D.C. 2011) (“It is well-settled in the D.C. Circuit that [the Service] is entitled—and, indeed, required—to rely upon the best available science, even if that science is uncertain or even ‘quite

inconclusive.’” (quoting *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000)); *Oceana, Inc. v. Ross*, 321 F. Supp. 3d 128, 142 (D.D.C. 2018) (explaining that the mandate to “use the best scientific and commercial data available . . . requires that, even where data may be inconclusive, an agency must rely on the best available scientific information”); *City of Las Vegas v. Lujan*, 891 F.2d 927, 933 (D.C. Cir. 1989) (concluding that a requirement to use the “best scientific and commercial data available” meant that “[e]ven if the available scientific and commercial data were quite inconclusive [the Service] may—indeed must—still rely on it”). The Service may not decline to designate critical habitat for the bee simply because data could be more complete.

Even if the Service’s assertion that it lacks landscape-level information about the bee’s presence were legally relevant, the record squarely contradicts this assertion. Not-Prudent Decision, RPBB0004. The record is replete with detailed information about the bee’s location and habitat needs. The Service has ample information about recent sightings and has actually *mapped* areas where the bee is “likely present.” Priority Map, RPBB0080; Key to Priority Map, RPBB1089; *see also* Section 10 Guidance, RPBB0102, 116 (explaining how maps showing potential habitat for the bee are based on the Service’s “habitat model” and “species survey data” from the Service’s geodatabase on the species). Among other things, the Service has mapped “high potential zones” that “provide a reasonable basis for describing where the species is likely to be present and where federal agencies should cooperate with the [Service] to evaluate the potential effects of their actions.” Habitat Connectivity Model, RPBB1090; *see also* Section 10 Guidance, RPBB0115 (instructing that “the species’ presence should be initially assumed” in the high-potential zones).

The Service also has peer-reviewed studies indicating that the bee forages within 0.6 miles of nesting sites, whereas it can disperse to establish new colonies and ranges within 0.6 to 6 miles of currently occupied areas. Habitat Connectivity Model, RPBB1090-91. Using this information, the Service has mapped areas “with potential to connect existing populations.” *Id.* at RPBB1092. Further still, the Service has described the specific habitat characteristics the bee requires during particular seasons and stages in its life cycle. *See supra* Factual Background I.A; Section 10 Guidance, RPBB0109-10. Even if the Service could legally withhold critical-habitat designation at this stage based on insufficient information—and it cannot, *see supra* pp. 40-41—the Service has failed to explain why these data are inadequate to support a designation.

* * *

In sum, the Catch-All Determination rests on three assertions that are each contrary to the law and to the record. And again, there is no indication that the Service would have found designation of critical habitat to be “not prudent” absent any one of these assertions. Accordingly, if it reaches the Catch-All Determination at all, the Court should set the Catch-All Determination aside if any of these three assertions is unlawful. *See supra* Argument II, at p. 38.

IV. Plaintiffs have standing to challenge the Service’s refusal to designate critical habitat

Plaintiffs have standing to challenge the Service’s Not-Prudent Decision on behalf of their members, whose interests in the rusty patched bumble bee are harmed by the Service’s decision. “To establish jurisdiction, the court need only find one plaintiff who has standing.” *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014). To establish standing on behalf of its members, an associational plaintiff must satisfy three requirements: “(1) at least one of its members would have standing to sue in his own right; (2) the interest it seeks to protect is germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the

member to participate in the lawsuit.” *Am. Trucking Ass’ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 247 (D.C. Cir. 2013). The second requirement is satisfied because protection of the environment, including endangered species like the bee, is central to each organization’s purpose. Decl. of Gina Trujillo ¶¶ 4-5; Decl. of Thomas E. Casey ¶ 1 (Casey Decl.); Decl. of David Noah Greenwald ¶¶ 3-4 (Greenwald Decl.). The third is also satisfied because Plaintiffs’ claims and requested relief—an order setting aside the Service’s decision—“obviously” do not require individual members’ participation. *Haz. Waste Treatment Council v. EPA*, 861 F.2d 270, 273 (D.C. Cir. 1988).

Plaintiffs’ members also have standing to sue in their own right because they have demonstrated an injury-in-fact that is traceable to the Service’s Not-Prudent Decision and redressable by a favorable decision. *See Growth Energy v. EPA*, 5 F.4th 1, 27 (D.C. Cir. 2021). Plaintiffs have submitted declarations establishing that their members have significant aesthetic, recreational, economic, and professional interests in searching for and viewing the rusty patched bumble bee in its habitat. *See* Casey Decl. ¶¶ 6-10, 13; Decl. of Clay Bolt ¶¶ 5-14 (Bolt Decl.); Decl. of Jason Taylor ¶¶ 4-12 (Taylor Decl.); Decl. of Bryan P. Newman ¶¶ 5, 7, 9, 11, 15 (Newman Decl.); Decl. of Andrew Wedel ¶¶ 3-9 (Wedel Decl.); Greenwald Decl. ¶¶ 7-9. These interests are threatened by the Service’s decision not to designate critical habitat for the bee—including in areas where Plaintiffs’ members seek out the bee—a decision that founders against the Service’s own conclusions that habitat loss and degradation are a primary factor in the bee’s decline, Listing Decision, RPBB0125, and that restoration of habitat is necessary for the bee’s recovery, Draft Recovery Plan, RPBB0049-50. *See* Casey Decl. ¶¶ 11-13, 15; Bolt Decl. ¶¶ 14-18; Taylor Decl. ¶¶ 13-14; Newman Decl. ¶¶ 14-15; Wedel Decl. ¶¶ 10-11; Greenwald Decl. ¶¶ 10-11. Without designated critical habitat in place, federal actions will continue

destroying and degrading the bee's remaining habitat without triggering mandatory safeguards that would apply to critical habitat under section 7.

For example, the Bell Bowl Prairie in Rockford, Illinois, provides prime habitat for the bee, and the species was seen there as recently as August 2021. Bolt Decl. ¶ 14. But the proposed expansion of the Chicago Rockford International Airport, which entails federal action by the Department of Transportation, threatens to destroy Bell Bowl Prairie early next year. *See id.* Absent critical-habitat designation for this area, it is substantially more likely that the expansion will destroy habitat for the bee and thus prevent NRDC member Clay Bolt from following through with his plans to search for and photograph the bee there. *See id.* ¶¶ 14-17. Similarly, NRDC member Thomas Casey is concerned that the Service's failure to designate critical habitat will likely result in federal management decisions that impair his interests in seeing the bee at the Minnesota Valley National Wildlife Refuge, where he regularly seeks out the bee. *See Casey Decl.* ¶¶ 10-12.

Given that the bee "presently lacks the ability to withstand physical and biological changes in the environment," Listing Decision, RPBB0144, continued destruction and degradation of habitat imperils the bee's remaining populations and compromises Plaintiffs' members' ability to find and engage with the bee. An order setting aside the Service's Not-Prudent Decision and directing the Service to designate habitat consistent with the ESA would likely result in protections for the bee's habitat, because designation of critical habitat would make mandatory interagency consultation to "insure" that any federal agency action "is not likely to . . . result in the destruction or adverse modification of [critical] habitat of [listed] species." 16 U.S.C. § 1536(a)(2). Given ample record evidence that habitat protection is crucial to the bee's conservation, this would help safeguard the bee and thereby further Plaintiffs'

members' interests in viewing and interacting with the species. *See* Draft Recovery Plan, RPBB0045; Listing Decision, RPBB0125.

In sum, Plaintiffs have demonstrated their members' concrete and particularized interests in the rusty patched bumble bee. The record reflects that the Service has failed to address a principal threat to the bee's continued existence. Moreover, an order setting aside the Service's decision is likely to result in needed habitat protections that would support the bee's conservation. This is sufficient to establish standing. *See Friends of Animals v. Ross*, 396 F. Supp. 3d 1, 8 (D.D.C. 2019); *NRDC v. Rauch*, 244 F. Supp. 3d 66, 85 n.22 (D.D.C. 2017).

CONCLUSION

Although the rusty patched bumble bee was once common and abundant throughout much of America, the survival of this native pollinator now hangs in the balance. The Service acknowledged in 2017 that, based on "optimistic modeling," the bee is "predicted to be extirpated within 5 years" in all but one of the six ecoregions in which the species remains. Listing Decision, RPBB0144. And yet, for years, the Service has shirked its statutory duties and repeatedly denied the bee meaningful protections. The Service's latest violation of the Act—its decision not to designate any critical habitat, despite the Act's direction that it do so to the maximum extent prudent and the Service's own repeated recognition that habitat protections are essential to the bee's recovery—must be set aside.

Accordingly, Plaintiffs respectfully request that the Court grant their summary judgment motion; declare unlawful and set aside the Service's Not-Prudent Decision; and direct 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.

Dated: December 6, 2021

Respectfully Submitted,

/s/ Lucas J. Rhoads

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2021, I caused Plaintiffs' Motion for Summary Judgment; Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment; declarations of Clay Bolt, Jason Taylor, Gina Trujillo, Thomas E. Casey, David Noah Greenwald, Andrew Wedel, and Bryan P. Newman; and Proposed Order to be filed and served upon counsel of record via the Court's CM/ECF filing system.

Dated: December 6, 2021

/s/ Lucas J. Rhoads