

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

NATURAL RESOURCES DEFENSE
COUNCIL, INC.,
40 West 20th Street,
New York, NY 10011

Plaintiff,

v.

Civil Action No. 1:19-CV-78

DAVID L. BERNHARDT, Acting Secretary of
the Interior, in his official capacity,
1849 C Street NW
Washington, DC 20240

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

JAMES W. KURTH, Deputy Director and
Acting Director of U.S. Fish & Wildlife
Service, in his official capacity,
1849 C Street NW
Washington, DC 20240

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

Defendants.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

INTRODUCTION

1. Plaintiff Natural Resources Defense Council challenges the failure of the Secretary of the Interior, U.S. Department of the Interior, Acting Director of the U.S. Fish and Wildlife Service, and U.S. Fish and Wildlife Service (collectively, “the

Service”), to designate critical habitat for the endangered rusty patched bumble bee, in violation of the Endangered Species Act (“ESA” or “the Act”), 16 U.S.C. § 1533. The Service’s failure to designate critical habitat leaves this highly endangered bee’s habitat at risk of destruction and decreases the species’ chances of survival.

2. The rusty patched bumble bee (*Bombus affinis*) is a pollinator that was once common throughout twenty-eight states in the midwestern and northeastern United States. Since the mid-1990s, however, the rusty patched bumble bee has disappeared from eighty-seven percent of the counties it once occupied. Threats to the bee include habitat loss, pesticide use, climate change, and disease.

3. The Service listed the rusty patched bumble bee as an endangered species on January 11, 2017. At that time, the Service concluded that critical habitat for the bee was “not determinable.” If critical habitat is not determinable at the time of listing, the Service must designate critical habitat within one year of the publication of the listing determination, based on the data available at that time. 16 U.S.C. § 1533(b)(6)(C)(ii).

4. As of the date of this Complaint, nearly one year past the statutory deadline, the Service still has not published a final rule designating critical habitat for the rusty patched bumble bee.

5. The survival and recovery of the rusty patched bumble bee depends on the preservation of the few areas of its habitat that remain. Without protection, those areas will be fragmented and destroyed, and the bee will go extinct.

JURISDICTION AND VENUE

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

7. The relief requested may be granted under 28 U.S.C. §§ 2201 and 2202 (declaratory and injunctive relief), 16 U.S.C. § 1540(g) (ESA), and 5 U.S.C. § 706 (Administrative Procedure Act).

8. Prior to initiating this action, NRDC provided the Service with sixty days' notice of the violation alleged herein, in accordance with 16 U.S.C. § 1540(g)(2)(C). A true and correct copy of NRDC's notice letter is attached as Exhibit A and incorporated herein by reference. The Service has not corrected its legal violation in response to NRDC's notice.

9. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(A) because defendants David L. Bernhardt, James W. Kurth, the U.S. Department of Interior, and the U.S. Fish and Wildlife Service all reside in the District of Columbia. Additionally, venue is proper because the alleged violation occurred in this district. 16 U.S.C. § 1540(g)(3)(A).

PARTIES

10. Plaintiff Natural Resources Defense Council ("NRDC") is an international non-profit membership organization whose mission is to ensure the rights of all people to the air, the water, and the wild. To that end, NRDC works to

protect and conserve species—such as the rusty patched bumble bee—that are essential not only to the proper functioning of natural ecosystems, but to the agricultural systems on which the world depends. NRDC has been active in efforts to protect endangered species generally and the rusty patched bumble bee specifically.

11. NRDC has offices in New York, NY; Washington, DC; San Francisco, CA; Santa Monica, CA; Chicago, IL; Bozeman, MT; and Beijing, China. NRDC has more than 384,000 members worldwide and 2,587 members in the District of Columbia alone. NRDC's members regularly seek out and enjoy the rusty patched bumble bee in its natural habitat. Those members plan to continue to seek out and enjoy the rusty patched bumble bee and thereby derive recreational, cultural, aesthetic, scientific, and other benefits from its continued existence. One example of such members is Clay Bolt of Bozeman, MT. The Service's failure to designate critical habitat for the rusty patched bumble bee imminently threatens his and other NRDC members' ability to enjoy those benefits.

12. Defendant David L. Bernhardt is sued in his official capacity as Acting Secretary of the U.S. Department of the Interior ("Secretary"). Secretary Bernhardt is one of the federal officials responsible for complying with the requirements of the ESA for terrestrial species. 16 U.S.C. § 1533(a)(1)(A), (3)(A). Those requirements include listing species as threatened or endangered and designating critical habitat for listed species.

13. Defendant James W. Kurth is sued in his official capacity as the Deputy Director and Acting Director of the U.S. Fish and Wildlife Service. Mr. Kurth is the official responsible for implementation of and compliance with the ESA pursuant to delegation from the Secretary. Mr. Kurth's duties include listing species as threatened or endangered and designating critical habitat for listed species.

14. Defendant U.S. Department of the Interior is an agency of the U.S. government. The Department of the Interior is responsible for the administration of the ESA, including listing and designating critical habitat for threatened or endangered terrestrial species such as the rusty patched bumble bee.

15. The U.S. Fish and Wildlife Service is an agency of the U.S. government within the U.S. Department of the Interior. The Secretary has delegated authority to the U.S. Fish and Wildlife Service to administer the ESA. The U.S. Fish and Wildlife Service is therefore legally responsible for listing and designating critical habitat for threatened or endangered terrestrial species such as the rusty patched bumble bee.

LEGAL BACKGROUND

16. Congress enacted the ESA to protect species in danger of extinction as well as the ecosystems upon which those species depend. 16 U.S.C. § 1531(b). The Act is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). The ESA's "language, history, and structure" indicate "beyond doubt that

Congress intended endangered species to be afforded the highest of priorities.” *Id.* at 174.

17. One of the main purposes of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b).

18. The ESA defines “conserve” and “conservation,” as “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.” *Id.* § 1532(3).

19. Section 4 of the ESA directs the Secretary to designate species as threatened or endangered under the Act. *Id.* § 1533(a)(1). The Act defines “species” as including “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” *Id.* § 1532(16). An endangered species is one that is “in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6).

20. If the Service determines that listing a species as threatened or endangered is warranted, it must publish a proposed rule to that effect. *Id.* § 1533(b)(5). The Service has one year from the date of publication of the proposed rule to publish a final rule either finalizing its determination or explaining why the proposed listing determination cannot or should not be made. *See id.* § 1533(b)(6)(A)(i).

21. If the Service publishes a final rule listing a species as threatened or endangered, it must designate critical habitat concurrently with that final rule. *Id.* § 1533(a)(3)(A)(ii).

22. The ESA defines critical habitat as “the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection” and “specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination . . . that such areas are essential for the conservation of the species.” *Id.* § 1532(5)(A).

23. The only exceptions to the requirement that the Service designate critical habitat concurrently with listing of the species are where designation is not prudent or critical habitat is “not then determinable.” *Id.* § 1533(a)(3)(A), (b)(6)(C).

24. Designation of critical habitat is not prudent where it would increase the risk of take or would otherwise “not be beneficial to the species.” 50 C.F.R. § 424.12(a)(1)(i), (ii).

25. Critical habitat is “not determinable” where “[d]ata sufficient to perform required analyses are lacking” and where the “biological needs” of the listed species are not sufficiently known to determine what areas constitute critical habitat. *Id.* § 424.12(a)(2)(i), (ii).

26. If critical habitat is not determinable at the time the Service lists a species, the Service must publish within one year a final regulation designating

critical habitat “based on such data as may be available at that time.” 16 U.S.C. § 1533(b)(6)(C)(ii).

FACTUAL BACKGROUND

The Rusty Patched Bumble Bee

27. The rusty patched bumble bee is a highly social species of bumble bee with up to 1,000 individuals in a single, healthy colony. The bees have entirely black heads and workers and males have a distinctive rusty-red patch on the back of their abdomen. U.S. Fish and Wildlife Serv., *Rusty Patched Bumble Bee (Bombus Affinis) Species Status Assessment 15* (June 2016) [hereinafter Status Assessment].¹

28. Prior to the mid-1990s, the rusty patched bumble bee was commonly found throughout twenty-eight states in the midwestern and northeastern United States, as well as the District of Columbia and two Canadian provinces. Endangered Species Status for Rusty Patched Bumble Bee, 82 Fed. Reg. 3,186, 3,187 (Jan. 11, 2017) [hereinafter “Final Listing”].

29. The population of rusty patched bumble bees has declined drastically since the late 1990s. The bee now occupies only eight percent of its historical range. Status Assessment at 4. Since 2000, only 103 populations of the rusty patched bumble bee have been documented—an eighty-eight percent decrease from the 926 populations documented prior to 2000. Moreover, of the 103 populations recorded in

¹ Available at <https://www.fws.gov/midwest/endangered/insects/rpbb/archives.html>.

recent years, ninety-five percent contain five or fewer individuals. Final Listing at 3,187-88.

30. The Service has estimated that, without ESA protection, the bee will “continue to decline over the next several decades,” *id.* at 3,188, resulting in its likely extinction within thirty years, Status Assessment at 4.

31. Habitat loss is a serious threat to the rusty patched bumble bee. The species is predominantly dependent on grassland habitat, which has declined by 99.9 percent since European settlement of North America. *Id.* at 49. Bee species depend on habitat with a high diversity of flowering plants to provide sustenance throughout their active season. *Id.* Rusty patched bumble bees are even more dependent on such diversity because they are a “short-tongued” species, meaning they are not able to feed on certain types of flowers. *Id.*

32. The floral resources on which the rusty patched bumble bee depends are threatened by conversion of lands to agriculture, urbanization, livestock grazing, fire suppression, and intensification of agricultural practices. *Id.* at 49-50. These factors have already caused much of the bee’s habitat to be “lost or fragmented.” *Id.* at 49. As the Service has concluded, “small, isolated patches” of suitable habitat may not be sufficient “to support healthy bee populations.” *Id.*

Listing History

33. On February 5, 2013, the Xerces Society for Invertebrate Conservation (“Xerces Society”) petitioned the Service to list the rusty patched bumble bee as an endangered species. *See Xerces Society, Petition to List the Rusty Patched Bumble*

Bee as an Endangered Species under the ESA (Jan. 31, 2013) [hereinafter Petition];² Endangered Species Status for Rusty Patched Bumble Bee, 81 Fed. Reg. 65,324, 65,325 (Sept. 22, 2016) (stating Petition received on Feb. 5, 2013).

34. After the Service failed to respond to the Petition, the Xerces Society and NRDC filed a lawsuit on May 13, 2014. Compl. for Inj. and Decl. Relief, *Xerces Soc. for Invertebrate Conserv. v. Jewell*, No. 1:14-cv-00802 (May 13, 2014). That litigation resulted in a December 24, 2014, settlement, wherein the Service agreed to complete the required ninety-day finding by September 30, 2015, and, if positive, to make the required 12-month finding by September 30, 2016. 81 Fed. Reg. at 65,325.

35. On September 22, 2016, the Service published a proposed rule to list the rusty patched bumble bee as an endangered species. *Id.* At that time, the Service proposed that designation of critical habitat for the bee may be prudent because designation would “not likely increase the degree of threat to the species and may provide some measure of benefit.” *Id.* at 65,332. The Service concluded, however, that critical habitat was “not determinable” at that time. *Id.*

36. On January 11, 2017, the Service issued a final rule listing the rusty patched bumble bee as an endangered species. Final Listing at 3,205. That rule reiterated the Service’s earlier conclusion that while designation of critical habitat might be prudent, it was not determinable at the time. *Id.* at 3,207.

² Available at <http://www.xerces.org/wp-content/uploads/2013/01/Bombus-affinis-petition.pdf>.

37. The Service did not designate critical habitat within one year of its final rule listing the rusty patched bumble bee as an endangered species.

38. Nearly twenty one months after issuance of the Final Rule, on October 19, 2018, NRDC sent the Service a notice indicating its intent to file a lawsuit if the Service failed to designate critical habitat for the rusty patched bumble bee within sixty days. Exhibit A [NRDC's Notice of Intent].

39. As of the date of this Complaint, the Service has not designated critical habitat for the rusty patched bumble bee.

CLAIM FOR RELIEF

Failure to Designate Critical Habitat

(Violation of the ESA or APA)

40. NRDC incorporates by reference all preceding paragraphs as if fully stated herein.

41. The Service had a non-discretionary duty, pursuant to 16 U.S.C. § 1533(b)(6)(C)(ii), to designate critical habitat for the endangered rusty patched bumble bee by no later than January 11, 2018. As of the date of this Complaint, the Service has failed to designate critical habitat for the rusty patched bumble bee, in violation of the ESA, 16 U.S.C. § 1540(g)(1)(C), or, in the alternative, the APA, 5 U.S.C. § 706(1).

PRAYER FOR RELIEF

NRDC respectfully requests that the Court enter judgment providing the following relief:

A. Declare that the Service's failure to designate critical habitat for the rusty patched bumble bee violates its non-discretionary duty under the ESA, 16 U.S.C. § 1533(b)(6)(C), or constitutes agency action unlawfully withheld under the APA, 5 U.S.C. § 706(1);

B. Order the Service to prepare and publish a final rule in the Federal Register designating critical habitat for the rusty patched bumble bee by a date certain;

C. Retain jurisdiction over this matter until the Service has complied fully with the Court's order;

D. Award NRDC costs and reasonable attorneys' fees in accordance with 16 U.S.C. § 1540(g)(4); and

E. Grant NRDC such additional relief as the court deems just and proper.

Dated: January 15, 2019.

Respectfully submitted,

/s/ Lucas J. Rhoads
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