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Public Comments Processing
Attn: Docket No. FWS-R3-ES-2015-0112
U.S. Fish & Wildlife Service, MS: BPHC
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Re: Comments of the Independent Petroleum Association of America and the American Petroleum Institute on the U.S. Fish & Wildlife Service’s 90-Day Finding on a Petition to List the Rusty-Patched Bumble Bee as an Endangered Species under the Endangered Species Act

Dear Sir or Madam,

The Independent Petroleum Association of America (“IPAA”) and the American Petroleum Institute (“API”) respectfully submit the following comments on the U.S. Fish & Wildlife Service’s (the “Service” or “FWS”) 90-Day Finding on the petition of Xerces Society for Invertebrate Conservation to list the rusty-patched bumble bee (“RPBB”) as an endangered species under the Endangered Species Act (“Petition”). 80 Fed. Reg. 56,423, 56,429 (Sept. 18, 2015) (“Notice”).¹

IPAA is a national trade association representing the thousands of independent crude oil and natural gas explorers and producers in the United States. It also operates in close cooperation with 44 unaffiliated independent national, state, and regional associations, which together represent thousands of royalty owners and the companies that provide services and supplies to the domestic industry. IPAA is dedicated to ensuring a strong, viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy developed in an environmentally responsible manner is essential to the national economy.

¹ IPAA and API take no position at this time on FWS’s petition findings and initiation of status reviews for the other species covered in the Notice. IPAA and API reserve the right to comment on any action that FWS may take with respect to those species in the future.

API is a national trade association representing over 625 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers.

COMMENTS

IPAA and API appreciate the opportunity to comment on the Service's 90-day finding on Xerces' petition to list the RPBB ("90-Day Finding") and to identify additional information that FWS should take into consideration for its status review of the species. Based on the information provided in the Notice, the administrative record, and the additional information cited in this submission, IPAA and API comment as follows:

The ESA requires FWS to make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. 16 U.S.C. § 1533(b)(3)(A). To help the Service evaluate a species for potential listing, the statute enumerates five factors that the agency must consider:

- (A) the present or threatened destruction, modification or curtailment of the species' habitat or range;
- (B) overutilization for commercial, recreational, scientific or educational purposes;
- (C) disease or predation;
- (D) inadequacy of existing regulatory mechanisms; and
- (E) other natural or manmade factors affecting its continued existence.

Id. § 1533(a)(1)(A)-(E); 50 C.F.R. § 424.11(c)(1)-(5). When performing this fact-intensive analysis, the agency must rely solely on "the best scientific and commercial data available" to determine the likelihood that a species will become endangered or extinct in the foreseeable future. 16 U.S.C. § 1533(b)(1)(A).

The Petition and the information underlying it do not meet this standard. As intimated in the Service's 90-Day Finding, significant portions of the Petition rely on conclusory assertions, inapposite studies, and incomplete data. The administrative record therefore does not present sufficient information to warrant listing the RPBB at this time. As the Service continues to work on its status review, it must compile and evaluate the best available scientific and commercial data on the RPBB, including all information about ongoing and planned activities that will provide a conservation benefit to the species. As discussed below, these activities include conservation efforts already being directed at other species such as the monarch butterfly and the northern long-eared bat.

In addition to conducting a status review for the RPBB, the Service should immediately initiate conservation programs that could help to protect the species' populations and habitat while protecting industry stakeholders from far-reaching regulatory restrictions in the event that the RPBB ultimately is listed. In particular, IPAA and API urge the Service to consider Safe Harbor protections for oil and gas operators who voluntarily modify their native seed mixes for re-vegetating project sites or modify their herbicide or pesticide use practices for the benefit of

the RPBB. Further, the Service should actively engage the regulated community and affected States to learn more about current efforts directly or indirectly benefitting the species, and to identify and participate in potential opportunities to enter into Candidate Conservation Agreements (“CCAs”) or Candidate Conservation Agreements with Assurances (“CCAAs”) to provide near term conservation benefits and regulatory certainty.

Finally, should the Service determine that listing the RPBB may be warranted, it should make a contemporaneous finding that designating critical habitat for the species is not prudent or determinable at this time. Such a finding is appropriate because there is insufficient information about the species, its habitat, and its conservation needs.

I. The RPBB’s Habitat and Range

A. The cited data are unreliable for evaluating the RPBB’s range and population health.

As a key basis for listing the RPBB, Xerces’ Petition alleges that the species’ range has decreased by 70-87% in recent years due to a variety of factors. Petition at 6. The information relied on in the Petition is incomplete, however, causing the analysis to be skewed and unreliable for purposes of gauging the species’ health. The Service must account for this in its ongoing status review.

To justify the assertion that the RPBB’s range and population numbers are decreasing, the Petition highlights two datasets: “historical data” and “contemporary data.” *Id.* at 5-6. The “historical” RPBB data spans a period of 115 years whereas the “contemporary” RPBB data spans a period of only 12. *Id.* The Petition fails to account for this nearly ten-fold difference in the data periods, or to “true up” the data to project the species’ range and frequency of occurrence had the data periods been similar. As a result, those datasets cannot be relied on to draw any conclusions about the species’ range or its population health within that range.

The Petition attempts to minimize these statistical shortcomings by asserting that “the bumble bee search effort has dramatically increased since 2000” and that “many observers have specifically targeted the rusty-patched bumble bee in recent years.” *Id.* at 5. These observations are *non sequiturs* for at least two reasons. First, rather than demonstrating a contraction of the RPBB’s range, the “contemporary” data indicate that the species may in fact have a broader range that now includes western Indiana and all of Illinois. *See id.* at 5, Figure 1. Second, the Petition’s estimate of an 87% decrease in the species’ range derives from only a small subset of the “contemporary” data. Specifically, it relies on a 2007-2009 field survey that located 16,000 bumble bees. *Id.* at 6. But it fails to explain how those data represent a dramatic contraction of range or a decrease in population numbers when compared to the “historical” collection of 73,000 bumble bees over a much larger time period. *See id.*

Nor does the Petition acknowledge the crucial limitations of the data on which it relies. The sole study that the Petition cites to support its visual representation of the alleged decline in the RPBB’s range plainly admits that “yearly fluctuations in bee numbers make comparisons of modern short-term studies to long-term historical data collections problematic.” S. Colla et al., *Assessing declines of North American bumble bees (Bombus spp.) using museum species*, 21 BIODIVERS.CONSERV. 3585, 3586, 3591 (2012). The study also concedes that the “presence in

recent time periods for each [bumble bee species] may be underrepresented.” *Id.* at 3592. And most importantly, the study ultimately found that there was no significant change in the RPBB’s relative abundance over time. *Id.* at 3591.

FWS must address these issues during its status review of the RPBB. As the ESA requires, the Service must collect the best scientific and commercial data available on the species’ abundance and distribution, ensure that any historical comparative datasets are commensurate, and then draw its own conclusions. To do this, at a minimum, the Service should proactively request all available data from each of the states within the RPBB’s historic range. After it establishes the necessary comprehensive data set to evaluate the species’ status, FWS must ensure that the compiled data are reliable. The methodology used to collect the data should play an important role in that analysis, and the Service should ensure that all data derives from reliable bumble bee survey protocols. *See, e.g.*, FWS, NATIONAL PROTOCOL FRAMEWORK FOR THE INVENTORY AND MONITORING OF BEES (2015).

B. The Petition does not establish that availability of wildflower habitat threatens the RPBB.

The Petition asserts that agricultural intensification and the loss of tall grass prairies pose significant threats to the RPBB’s populations. Petition at 11. It also alleges that the “widespread application of the herbicide glyphosate in conjunction with increased planting of genetically modified crops that are tolerant to glyphosate has likely reduced the availability of wildflowers in agricultural field margins.” *Id.* While the Petition asserts that the studies cited for these points have linked floral abundance and bumble bee diversity, as well as agricultural intensification and bumble bee population decline, none of the cited studies and data establish that there is a lack of wildflower habitat available to the RPBB or that habitat availability has appreciably affected the RPBB’s distribution or abundance. *See id.* FWS must acknowledge and account for these gaps in its status review.

The Service must compile the best scientific and commercial data available to properly evaluate the alleged habitat-based impacts to the RPBB cited in the Petition. In particular, FWS must collect all data necessary to analyze (1) the numeric extent of existing wildflower habitat in the RPBB’s range, (2) the degree, if any, to which human activities and other drivers impact that habitat, both positively and negatively, and (3) the degree to which the extent of that habitat “drives, or contributes to, the risk [if any] of extinction” of the RPBB. 80 Fed. Reg. at 56,425.

As part of that process, it is imperative that the Service account for the significant conservation benefits to the RPBB and its habitat from existing programs and activities. For example, to help conserve the northern long-eared bat, many project developers in the oil and gas industry and other industries utilize FWS-prescribed best practices that involve re-vegetating project areas with native seed mixes, which often include native wildflower species, and the minimization of pesticide and herbicide use when maintaining reseeded project areas. *See, e.g.*, FWS, West Virginia Field Office Guidance on Developing and Implementing a Myotis Bat Conservation Plan, Appendix B – Recommendations for Avoidance and Minimization Measures (June 10, 2015); FWS, Northern Long-Eared Bat Interim Conference and Planning Guidance, Appendix D – NLEB Conservation Measures at D-4 to D-6 (Jan. 6, 2014). And because the northern long-eared bat’s range encompasses the entire range of the RPBB, the latter will share in those conservation benefits range-wide. *See* Northern Long-Eared Bat: Range Map, FWS,

<http://www.fws.gov/midwest/endangered/mammals/nleb/nlebRangeMap.html>. Moreover, as noted in the Petition, natural areas within urban environments “can provide valuable flora, and in some cases, nesting and overwintering resources, and may serve as important habitat refuges for bumble bees.” Petition at 12. All of these potential conservation benefits should be identified and considered during the RPBB status review as the Service’s Policy for the Evaluation of Conservation Efforts (“PECE”) requires.

C. The Petition does not demonstrate that RPBB nesting and overwintering sites are a limiting factor.

While the Petition makes much of the availability of “tall grass prairies” to serve as habitat for the RPBB, it ignores that nesting and overwintering sites for the RPBB are plentiful and does not identify any widespread threats to these sites. As the Petition acknowledges, RPBB nests are “usually one to four feet below ground in abandoned rodent nests or other cavities,” although some nests have been found above ground, and overwintering sites are thought to be oval shaped chambers formed by queens after they have dug a few centimeters into “soft, disturbed soil.” Petition at 26. The only threats to these sites alleged in the Petition are: the potential disturbance of above ground nests by livestock and agriculture, and potential reductions in underground nesting cavities due to the impacts that livestock and global climate change may have on rodent populations. *Id.* at 11-12. By contrast, the Petition names multiple human and natural activities that are creating new nesting and overwintering sites throughout the species’ range, including urban and residential gardens, urban and residential composting, urban parks, and mole hills.

The Service must compile the best scientific and commercial data available to properly evaluate the existing extent of nesting and overwintering sites for the RPBB and potential threats to them. Again, it is imperative that the Service account for the conservation benefits afforded by human activities, including the oil and gas industry’s active creation of areas that the species can use as overwintering sites through the seeding and maintenance of re-vegetated pipeline corridors throughout the RPBB’s range. Moreover, to the extent that the Service relies on the absence of nesting or overwintering sites in its status review, the Service must explain how the data support that conclusion, especially in light of the abundance of significant, stable rodent populations that create nesting and overwintering features within the RPBB’s range.

II. The Service Should Not Consider Pathogens that Have No Documented Effect on the RPBB.

The Petition asserts that “[p]athogens and parasites pose a substantial threat to the continued survival of the [RPBB].” Petition at 13. Yet, as the Service acknowledges, many of the diseases cited in the Petition have not been shown to affect the RPBB. For instance, the Service concluded that two microparasites under the genus *Crithidia* have not been shown to occur within the RPBB’s range and therefore have not been shown to present a threat to the RPBB. 90-Day Finding at 4-5. The Service also concluded that no information has been provided that indicates that RNA viruses affect the RPBB. *Id.* at 5. Thus, the Service correctly found that there is no information supporting the argument that potential spillover of such viruses from honeybee populations presents a threat to the RPBB. *Id.* at 5-6. Indeed, as the Service noted, the Petition itself acknowledges that “[t]he virulence of many of these RNA viruses in bumble bees has not yet been evaluated.” Petition at 17.

When evaluating the effect of disease on the RPBB, the Service may only rely on data and studies that demonstrate that a particular pathogen directly affects the species. It would be inappropriate to consider the potential effects of a pathogen when there is no evidence that that particular pathogen actually affects the RPBB. Further, for each pathogen that is shown to have an effect on the species, the Service must use the best available scientific and commercial data to determine the pathogen's virulence and evaluate the degree to which it is affecting the RPBB alone and in combination with other pathogens.

III. Existing Regulatory Mechanisms Are Adequate, and Are Benefitting the RPBB.

When evaluating a possible listing decision for any species, the ESA requires the Service to “tak[e] into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction.” 16 U.S.C. § 1533(b)(1)(A). As the Petition recognizes, several key States—Wisconsin, Michigan, and Connecticut—have listed the RPBB for protection, and Canada has listed the species under its own endangered species statute (the Species At Risk Act), which protects RPBB habitat on all Canadian federal lands. Petition at 18. These protections in and of themselves are adequate regulatory mechanisms to conserve the species, but there are additional mechanisms in place and in development that will further protect the RPBB.²

Of particular relevance is the U.S. Department of Agriculture's (“USDA”) honey bee program—part of the Environmental Quality Incentives Program—which provides funding to farmers and landowners in upper Midwestern States to “implement conservation practices that will provide safe and diverse food sources for honey bees.” USDA, *NRCS Announces Early EQIP Signup for 2016 Funding*, Sept. 2, 2015.³ The tools for these conservation efforts include pasture management, creation and preservation of wildlife habitat, and the use of appropriate cover crops—all of which would strongly benefit wild bumble bee populations like the RPBB. *Id.*

Another major effort is USDA's partnership with FWS, numerous states, and private stakeholders to conserve and regenerate monarch butterfly habitat, which is similar to that required by the RPBB. The USDA's Conservation Stewardship Program offers “incentives for farmers and ranchers who plant milkweed and other nectar-rich plants favored by monarch butterflies.” J. Fritscher & J. Benjamin, *Updated USDA Program Enables Farmers and Ranchers to Help Monarch Butterflies*, June 19, 2015.⁴ Notably, milkweed's high quality nectar “is not only used by monarchs but native and honey bees, too.” *Id.*

The USDA's significant efforts to conserve and expand the habitat of honey bees and monarch butterflies will provide direct benefits to the RPBB because of their shared habitat and food source needs, namely nectar-rich native plants. The USDA's efforts also lay the groundwork for similar efforts to begin immediately for the benefit of the RPBB. The Service should take into account these efforts and existing regulatory protections, and the benefits that

² Again, pursuant to the Service's PECE policy, it will be important for FWS to consider all such conservation mechanisms during its species status review.

³ Available at <http://www.nrcs.usda.gov/wps/portal/nrcs/detail/wi/newsroom/releases/?cid=nrcseprd394011>.

⁴ Available at <http://blogs.usda.gov/2015/06/19/updated-usda-program-enables-farmers-and-ranchers-to-help-wmonarch-butterflies/>.

both afford, when considering whether the RPBB should be listed.

IV. The Service Should Consider Safe Harbor Protection for Oil and Gas Operators That Modify Their Best Practices For the Benefit of the RPBB.

As discussed above in Sections I.B and I.C, many members of the oil and gas industry already offer significant benefits to the RPBB by undertaking voluntary measures, such as (1) creating and maintaining wildflower habitat and overwintering sites by re-vegetating disturbed project areas with native seed mixes, and (2) minimizing the use of pesticides and herbicides in certain areas and times of year. These practices benefit the RPBB wherever they are employed within the species' range. In the event that the Service finds that a listing of the RPBB is warranted, IPAA and API urge FWS to consider Safe Harbor protection for oil and gas operators that voluntarily take on these types of conservation measures to further benefit the RPBB.

V. The Service Should Take Steps to Work with Private Parties and State Wildlife Agencies on Candidate Conservation Agreements for the RPBB.

The Service should engage private parties and state wildlife agencies on CCAs and CCAAs in advance of any potential listing of the RPBB. As the Service knows, CCA and CCAA participants voluntarily commit to implement specific actions designed to remove or reduce threats to the covered species. Early implementation of conservation efforts is in all parties' best interest, as implementation before a species is listed increases the likelihood that simpler, more cost-effective conservation options are available, and increases the success rate of such conservation efforts. Implementation of a CCA or CCAA may in fact eliminate the need for listing the RPBB in the first place. Early consideration of CCAs or CCAAs is particularly relevant in the RPBB's case because efforts to conserve and regenerate habitat similar or identical to that of the RPBB already exist and are ongoing. *See supra* Section I.B and Section III on conservation efforts to benefit the honey bee, the monarch butterfly, and the northern long-eared bat.

VI. Designating Critical Habitat for the RPBB is Not Prudent and Determinable.

If, after completing its status review, the Service determines that listing for the RPBB is warranted, it should make a contemporaneous finding that designating critical habitat for the species under Section 4 of the ESA is not prudent and determinable at this time. 16 U.S.C. § 1533(a)(3)(A). Critical habitat consists of the specific areas within a species' geographical range that are considered essential to the conservation of the species and which may require special management considerations or protection. 16 U.S.C. § 1532(5)(A). The Petition does not provide any information regarding essential habitat for the RPBB that could be used by the Service to support a proposal for designation. Nor is sufficient information currently known about the species' biology and life needs to identify particular habitat features and areas that are "essential" to its survival and recovery. This is not surprising given the wide range of the species across numerous states. But it precludes FWS from proposing critical habitat for the species at this time.

CONCLUSION

Thank you for considering these comments. IPAA and API look forward to continuing to work with the Service to resolve these issues in accordance with the requirements and limitations of the Endangered Species Act.

Sincerely,



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