November 21, 2016

Public Comments Processing
Attn: Docket No. FWS-R3-ES-2015-0112
U.S. Fish & Wildlife Service, MS: BPHC
5275 Leesburg Pike,
Falls Church, VA 22041-3803

Submitted via Regulations.gov

Re: Comments on the Proposal to List the Rusty-Patched Bumble Bee as an Endangered Species; Docket No. FWS–R3–ES–2015–0112; 4500030113, RIN 1018–BB66.

Dear Sir or Madam:

CropLife America ("CLA") respectfully submits these comments on the U.S. Fish & Wildlife Service ("the Service")'s proposed rule to list the rusty-patched bumble bee ("RPBB") as an endangered species under the Endangered Species Act ("ESA"), 81 Fed. Reg. 65,324 (Sept. 22, 2016) ("Proposal" or "Proposed Rule").

CLA is the national trade association that represents the manufacturers, formulators, and distributors of the vital crop protection and biotechnology products used by farmers, ranchers, landowners, and home gardeners. CLA encourages farming practices and supports environmental policies that are based on sound science and best practices, and that respect and maintain U.S. farmers' ability to grow healthy and abundant food, feed and fuel. CLA and its members are also committed to advancing the environmental sustainability of U.S. agriculture. We believe that our nation can achieve our environmental goals—including goals to preserve and enhance biodiversity in agricultural landscapes—while maintaining and improving agricultural productivity.

CLA commends the Service on its dedication to conserving biodiversity. However, as explained below, the Proposed Rule listing the RPBB as an endangered species under the ESA is not consistent with controlling statutes and regulations or supported by the existing administrative record. Also, the Service did not consider the U.S. Environmental Protection Agency (EPA)'s expertise or responsibility in regulating pesticides or the extensive pollinator conservation efforts currently underway.

LEGAL BACKGROUND

The ESA requires the Service to make findings 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 species shall be listed if the Service determines, on the basis of the best scientific and commercial data available after conducting a review of the species' status, that the species is endangered or threatened because of any one or a combination of the following factors:

(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.

50 C.F.R. § 424.11(c)(1)-(5). When making a listing decision, the Service shall take into account "those efforts, if any, …to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices…." 50 C.F.R. § 424.11(f); 16 U.S.C. § 1533(b)(1)(A). The Proposal and the Service's Species Status Assessment (Final Report, Version 1, June 2016) ("SSA"), which serves as the biological underpinning and administrative record for the Proposal, do not contain sufficient scientific justification for listing the RPBB as endangered. The Service, therefore, must withdraw the Proposed Rule.

ERRORS AND INADEQUACIES IN THE PROPOSAL

The Proposal is not Supported by Substantial Scientific or Commercial Information

The Proposed Rule states that "[w]hile the exact cause of the [RPBB's] decline is uncertain, the primary causes attributed to the decline include habitat loss and degradation, pathogens, pesticides, and small population dynamics." 81 Fed. Reg. 65324. According to the SSA, the Service's own experts judged pathogens and habitat loss and degradation to likely account for over half of the population decline, 31 percent and 23 percent, respectively (pp 55-56). A mixed set of other "stressors," including climate change, small population dynamics, and pesticides were each estimated to contribute approximately 15 percent to the RPBB's decline (p 56).

Despite the Service's finding that pesticides at most contribute approximately 15 percent to the RPBB's population decline, the SSA goes into great detail regarding the presumed negative effects of pesticide use on the RPBB. As discussed in detail in the comments submitted by Bayer CropScience, "Comments on the Rusty Patched Bumble Bee (Bombus affinis) Species Status Assessment Report," November 21, 2016 ("Bayer Comments"), the SSA contains multiple factual and scientific inaccuracies. As an example, the SSA purports to link neonicotinoid insecticide use with RPBB population decline. As the Bayer Comments make clear, however, the RPBB decline preceded the widespread use of neonicotinoids by several years (pp 2, 6). In fact, the data show that the species actually is persisting where there is widespread neonicotinoid use in corn and soybean production, but nonexistent or in great decline in other areas of its range, such as Appalachia, which have minimal agricultural production (P 2, 9).

The Service Failed to Acknowledge the Extensive Efforts by EPA to Protect Pollinators, Including the RPBB

Notwithstanding the proposal's emphasis on the claimed effects of pesticides on the RPBB, absent from the Proposal or SSA is any mention of EPA's statutory role in determining the ecological risk assessment of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). Pesticides are among the most heavily regulated substances in the United States. EPA regulates pesticides under a comprehensive, science-based regime pursuant to its authority under FIFRA. Under FIFRA, all pesticide products must be registered by EPA before they can be marketed, distributed, or sold in the U.S. *See* 7 U.S.C. §§ 136a(c)(5), 136j(a)(1). To obtain a pesticide registration, an applicant must submit extensive scientific data to EPA to demonstrate that use of the product in accordance with its label will not pose "unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits" of the product. 7 U.S.C. § 136(bb).

In conducting its risk-based determination of whether registration of a pesticide product meets the FIFRA standard, EPA reviews extensive data pertaining to the pesticide's active ingredient as well as formulations and particular uses of the pesticide. 7 U.S.C. § 136a; 40 C.F.R. §§ 152.100–152.119. EPA also conducts a variety of risk assessments that identify and analyze potential risks that could be associated with various uses, including risks to beneficial or "non-target" organisms, such as pollinators. Only upon determining that a pesticide use will not have an unreasonable adverse effect on the environment will EPA allow the use. 7 U.S.C. § 136a(c)(5)(C), (D). All the pesticide products discussed in the SSA have cleared EPA's registration process under FIFRA and have been found to "perform [their] intended function without unreasonable adverse effects on the environment," which includes pollinators. *Id.* § 136a(c)(5)(C).

In addition to the rigorous registration process discussed above, EPA has recently taken several measures to specifically protect bees, including the RPBB, against the potential risks posed by pesticides. In 2011, EPA expanded its risk assessment process for bees, requiring more specific data to quantify or measure pesticide exposures and relate them to effects at the individual and colony level. In 2012, EPA collaborated with Canada's Pest Management Regulatory Agency and the California Department of Pesticide Regulation to present to a FIFRA Scientific Advisory Panel a new quantitative risk assessment framework for bees and other insect pollinators. In 2013, EPA developed new label text for neonicotinoid insecticides intended to minimize pollinator exposure to these pesticides. EPA now employs this new pollinator risk assessment framework as part of its environmental risk assessment process. In fact, EPA is currently in the process of performing risk assessments, using the new pollinator risk assessment framework as part of the registration review process for four neonicotinoid pesticides. The risk assessments will address the potential risks posed to pollinators by the use of these products and EPA has encouraged participation from all stakeholders in this process.

The Service's failure to consider EPA's regulatory role over pesticides, as well as its failure to address EPA's recent actions taken to protect pollinators, including the RPBB, violates the Service's mandate to consider the adequacy of existing regulatory programs. 16 U.S.C. § 1533(a)(1)(D), 50 C.F.R. § 424.11(c)(4).

The Federal Government is Engaged in Extensive Pollinator Conservation Efforts, Which Have Not Been Considered by the Service.

In the last several years, the federal government has launched several extensive conservation efforts specifically aimed at protecting pollinators. For example, in 2013, EPA held a summit on reducing pollinator exposure to dust from neonicotinoid treated seed that provided a forum for stakeholders to learn about current research, new technologies, best practices and other stewardship activities to protect bees from unintended pesticide exposure. More recently, in 2014, President Obama issued a memorandum establishing a Pollinator Health Task Force, co-chaired by the United States Department of Agriculture ("USDA") and EPA. The Pollinator Health Task Force issued a National Pollinator Health Strategy (the "Strategy") detailing federal efforts on understanding, preventing and recovering from pollinator losses. The Strategy includes a plan for expanding and coordinating public education programs instructing individuals and businesses on steps they can take to reduce the loss of pollinators. EPA is also working with state and tribal agencies to develop and implement local pollinator protection plans, known as Managed Pollinator Protection Plans ("MP3s"). EPA is promoting MP3s to address the use of pesticides in areas other than where bees are brought onsite to provide contract pollination services.

EPA and USDA are also part of the North American Pollinator Protection Campaign ("NAPPC"), which is collaborative body of more than 160 diverse partners, including respected scientists, researchers, conservationists, government officials and dedicated volunteers. NAPPC's mission is to encourage the health of North American pollinators. Among other things, NAPPC works to raise public awareness and education and promote dialogue about pollinators' importance to agriculture, ecosystem health, and food supplies; encourage collaborative, working partnerships among participants and with federal, state and local government entities; promote conservation, protection and restoration of pollinator habitat; and support scientific, economic and policy research.

Additional conservation efforts are being undertaken by the Organization for Economic Cooperation and Development's Pesticide Effects on Insect Pollinators working group;[1] the International Commission on Plant Pollinator Relationships;[2] the European Food Safety Authority;[3] and Health Canada's Pest Management Regulatory Agency.[4] EPA is working with all of these groups to improve pollinator health. Finally, EPA has a standing work group whose membership includes public health and academic institutions, federal and state agencies, conservation groups, grower groups, pesticide manufacturers and other stakeholders that focuses exclusively on pollinator protection within its Pesticide Program Dialogue Committee.

Clearly such efforts can and do improve pollinator health and should affect the Service's determination to list the RPBB. As such, they should be considered. There is no

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[1] http://www.oecd.org/chemicalsafety/risk-mitigation-pollinators/ Managing Risk to Insect Pollinators.
[2] http://www.uoguelph.ca/icpbr/index.html.
[3] http://www.efsa.europa.eu/en/topics/topic/beehealth.
[4] http://www.hc-sc.gc.ca/cps-spc/pest/agri-commerce/pollinators-pollinisateurs/index-eng.php.
—developing the risk assessment process, mitigation approaches and evaluating the neonicotinoids.

evidence in the Proposal or the SSA that the Service evaluated the above-mentioned conservation efforts. Under ESA Section 4(b), the Service is required to take "into account those [conservation] efforts, *if any*, being made by any State" before making a listing decision. 16 U.S.C. § 1533(b)(1)(A). Moreover, the Service's Policy for Evaluation of Conservation Efforts When Making Listing Decisions ("PECE") requires the Service to consider conservation efforts, including conservation efforts that have not yet been implemented or demonstrated their effectiveness, so long as the Service is certain that the conservation effort will be implemented and, once implemented, will be effective. 68 Fed. Reg. 15,100, 15,114 (Mar. 28, 2003). Failure to comply with PECE is grounds for vacator of a final listing rule. *See Permian Basin Petroleum Ass'n* v. *Dept. of the Interior*, 127 F. Supp. 3d 700 (E.D. Tex. 2015) (vacating listing decision for the Lesser Prairie Chicken because the Service failed to comply with PECE).

CONCLUSION

The Proposal and SSA as currently written contain significant inaccuracies and unsupported scientific conclusions. In addition, the Service failed to consider EPA's work—as the expert agency tasked with regulating pesticide use for pollinator health—on pollinator health issues and also failed to consider the extensive conservations efforts in effect for pollinators. We respectfully request that the Service withdraw the Proposed Rule and take additional time to revise the SSA and listing proposal into a more balanced, and complete assessment, one that considers and weighs all the available information including the best scientific and commercial data available.

Thank you for your consideration of these comments. Should you have any questions, please contact me by email or telephone.

Respectfully submitted,

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