



March 1, 2017

BY CERTIFIED MAIL

The Honorable Ryan Zinke, Secretary of the Interior
U.S. Department of the Interior
Office of the Secretary
1849 C Street, N.W.
Washington, D.C. 20240

The Honorable Jim Kurth, Acting Director
U.S. Fish & Wildlife Service
1849 C Street, N.W., Room 3331
Mailstop 7328
Washington, D.C. 20240

Re: Emergency Petition to Extend Effective Date of Final Rule Designating Rusty Patched Bumble Bee as Endangered

Dear Secretary Zinke and Acting Director Kurth:

Pursuant to the Right to Petition Government Clause of the First Amendment of the U.S. Constitution¹ and Section 553(e) of the Administrative Procedure Act, 5 U.S.C. § 553(e),² the

¹ “Congress shall make no law...abridging...the right of the people...to petition Government for a redress of grievances.” U.S. Const., amend. I. The right to petition for redress of grievances is among the most precious of the rights and liberties safeguarded by the Bill of Rights. *See United Mine Workers of Am. Dist. 12 v. Ill. State Bar Ass’n*, 389 U.S. 217, 222 (1967). It shares the “preferred place” accorded in our system of government to the First Amendment freedoms and has “a sanctity and sanction not permitting dubious intrusions.” *Thomas v. Collins*, 323 U.S. 516, 530 (1945). “Any attempt to restrict those First Amendment liberties must be justified by clear public interest, threatened not doubtful or remotely, but by clear and present danger.” *Id.*

² Section 553(e) of the APA provides that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e); *see also* 43 C.F.R. § 14.2 (“Under the Administrative Procedure Act, any person may petition [the Department of the Interior] for the issuance, amendment, or repeal of a rule . . .”).

American Petroleum Institute, CropLife America, Independent Petroleum Association of America, National Association of Home Builders, National Cotton Council, and National Rural Electric Cooperative Association (collectively “Petitioners”) hereby submit this petition, on an emergency basis, to the U.S. Department of the Interior (“the Department”) and the U.S. Fish and Wildlife Service (“FWS” or “the Service”). Petitioners ask the Department and the Service to extend the current March 21, 2017 effective date of the final rule listing the rusty patched bumble bee (“RPBB”) as endangered under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*,³ until January 11, 2018.

As explained more fully below, on January 11, 2017, the Obama Administration issued its final rule listing the RPBB as an endangered species. In an apparent attempt to issue the rule before Inauguration Day, the Administration finalized the listing decision – one that had taken over 43 months to propose – just seven weeks after the close of the public comment period. By rushing to issue this listing decision before the Trump Administration took office, FWS brushed aside hundreds of substantive comments and extensive information highlighting the agency’s deficient and overly simplistic analysis of complex biological issues, ignored clear flaws in the science and data on which the Service relied in listing the RPBB, and disregarded important new scientific information that undercuts the agency’s position on the status of the species.

The implications of this hasty listing decision are difficult to overstate. The listing of the RPBB is one of the most significant species listings in decades in terms of scope and impact on human activities. According to FWS⁴, the RPBB has an extensive range, currently spanning thirteen states including Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, and Wisconsin. The Service further asserts that the species’ pre-2000 range is even broader, additionally covering Connecticut, Delaware, the District of Columbia, Georgia, Kentucky, Michigan, Missouri, New Hampshire, New Jersey, New York, North Dakota, Rhode Island, South Carolina, South Dakota, Vermont, and West Virginia. Within its range, the RPBB is believed to inhabit a variety of areas: throughout the Spring, Summer, and early Fall it nests in colonies underground, generally in fields in rural and suburban areas; in winter, RPBB queens hibernate underground in a range of habitats from fields to forests.

Once the listing decision takes effect, virtually every industry operating within the species’ range – from agriculture and crop production to residential and commercial development, from energy production and distribution to manufacturing, will be profoundly affected. This is because, as FWS has candidly acknowledged in discussions with Petitioners, there is insufficient understanding of the RPBB’s biology to allow parties to reliably locate the bee’s underground nesting and hibernation sites, making it impossible to identify or evaluate the potential impacts of any given activity on the species. FWS’s rushed timeline for issuing the decision exacerbated these problems because it prevented agency biologists from developing species survey procedures and from coordinating a regulatory strategy between the Service’s

³ Endangered and Threatened Wildlife and Plants; Endangered Species Status for Rusty Patched Bumble Bee, Final Rule, 82 Fed. Reg. 3186 (Jan. 11, 2017).

⁴ *See id.* at 3187.

offices before the listing was finalized. As a result, apart from simply abandoning billions of dollars in economic activities, there will be no clear way for businesses and individuals to confidently conduct those activities anywhere within the RPBB's extensive range without blindly risking a possible ESA violation, subjecting projects to the irreconcilable requirements that FWS's different field offices are adopting, or facing the threat of already-issued federal permits being rescinded until survey guidance and recommended conservation measures become available.

For these reasons and consistent with the Trump Administration's Presidential Memorandum to the Heads of Executive Departments and Agencies, "Regulatory Freeze Pending Review," issued by Chief of Staff Reince Priebus on January 20, 2017 ("Priebus Memorandum")⁵, Petitioners respectfully request that FWS exercise its discretion to extend the effective date of the RPBB listing decision until January 11, 2018. Doing so will provide the new Administration with the opportunity to evaluate the rule and administrative record underlying it – including the scores of stakeholder comments that to-date have gone unconsidered – to verify whether the listing in fact is warranted and, if so, to develop a strategy for implementing such a large and complex decision before it takes effect.

I. Interests of Petitioners

American Petroleum Institute ("API") is a national trade association representing over 640 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.

CropLife America ("CLA") is a national, private, not-for-profit trade association that represents the developers, manufacturers, formulators, and distributors of crop protection products for agriculture and pest management in the United States. CLA has 27 registrant member companies, which produce, distribute, and sell virtually all of the vital and necessary crop protection and biotechnology products used by American farmers, ranchers, and landowners. CLA member products are registered with the U.S. Environmental Protection Agency for use in the United States under the Federal Insecticide, Fungicide, and Rodenticide Act. 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. CLA believes that our nation can achieve its environmental goals – including goals to preserve and enhance biodiversity in agricultural landscapes – while maintaining and improving agricultural productivity. An erroneous listing of the RPBB would have great impact on a large swath of the agricultural land in the United States. Thus, farmers' ability to use invaluable pesticide products may be seriously impacted by the listing. While CLA and its members support biological diversity, the government must use the best available science when making listing decisions.

⁵ See <https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies>.

Independent Petroleum Association of America (“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.

National Association of Home Builders (“NAHB”) is a nationwide federation of more than 800 state and local homebuilder associations. NAHB has more than 140,000 members including individuals and firms engaged in land development, single and multifamily construction, multifamily ownership, building material trades, and commercial and industrial projects. Over 80 percent of NAHB’s members are classified as “small businesses” and meet the federal definition of a “small entity,” as defined by the U.S. Small Business Administration. Economic research performed by NAHB has shown the added cost of regulations from all levels of government (e.g., local, state, and federal) accounts for nearly 25% percent of the final sale price for the average newly built single family home. NAHB members are often directly impacted by the ESA due to the potential for their projects to occur in areas with either a federally protected species (i.e., listed species) or designated critical habitat. While NAHB members seek to avoid impacting endangered or threatened species or their designated critical habitat, given the ever increasing number of federally protected species under the ESA as well as FWS’s decision to federally protect species like the RPBB with extremely large habitat ranges, for most builders and developers simply avoiding impacts to endangered species is proving increasingly difficult to accomplish.

NAHB members, whose projects are impacted by the ESA, become subject to one of the ESA’s two permitting programs: Section 7 consultation for projects with a federal nexus (e.g., requiring a federal permit such as federal wetlands permits); and the Section 10 Incidental Take Permit (“ITP”) for wholly private actions where the Service determines the proposed activity will result in the “take” of an endangered or threatened species. Regardless of which ESA permitting process NAHB members are required to follow, the results are the same: significant project delays, costly project modifications, or even termination of a proposed project as a direct result of ESA-related compliance difficulties. According to building permit data collected by the U.S. Census Bureau, nearly 60,000 single family homes and multifamily buildings (e.g., apartment or condominium units) were permitted for construction in these areas during 2015 alone. Accordingly, FWS’s decision to list the RPBB as an endangered species will have direct and significant impacts upon NAHB’s membership and the residential construction industry within the affected states and counties.

National Cotton Council (“NCC”) is the central organization of the United States cotton industry. Its members include producers, ginner, cottonseed processors and merchandizers, merchants, cooperatives, warehouse and textile manufacturers. A majority of the industry is concentrated in 17 cotton-producing states stretching from Virginia to California. The NCC represents producers who cultivate between 9 and 12 million acres of cotton. Annual cotton production, averaging approximately 12 to 18 million 480-lb bales, is valued at more than \$5

billion at the farm gate. The downstream manufacturers of cotton apparel and home furnishings are located in virtually every state. Farms and businesses directly involved in the production, distribution, and processing of cotton employ more than 125,000 workers and produce direct business revenue of more than \$21 billion. Accounting for the ripple effect of cotton through the broader economy, direct and indirect employment surpasses 375,000 workers with economic activity well in excess of \$75 billion. In addition to the cotton fiber, cottonseed products are used for livestock feed, and cottonseed oil is used as an ingredient in food products as well as being a premium cooking oil.

National Rural Electric Cooperative Association (“NRECA”) is the national service organization dedicated to representing the interests of rural electric utilities and the consumers they serve. NRECA represents more than 900 rural electric cooperatives and public power districts, who collectively provide electricity to over 42 million people in 47 states, or nearly 13 percent of the nation’s electric customers. NRECA serves its members as an advocate for legislative and regulatory policies that are scientifically sound and cost-effective, and that balance consumer interests and environmental protection. Electric generation and transmission (“G&T”) and distribution cooperatives are private, independent, not-for-profit electric utility businesses that are owned by the customers they serve. The typical distribution cooperative is a small business entity, according to the Small Business Administration, that serves 13,000 member-consumers. Collectively, electric cooperatives own and maintain 2.5 million miles or 42 percent of the nation’s electric distribution lines, covering 75 percent of the U.S. landmass. They serve more than 19 million businesses, homes, schools, churches, hospitals, farms, irrigation systems, and other establishments.

NRECA believes this listing could impact as many as 207 distribution cooperatives and G&Ts within the RPBB’s current range. In addition, more than 100 NRECA members have service territories that overlap all or portions of the RPBB’s historic range. These electric cooperatives have legal public service obligations to provide reliable electric service to their customers in these areas. NRECA is concerned that the RPBB listing may conflict with other federal mandates (i.e., Energy Policy Act of 2005 and North American Electric Reliability Corporation Transmission Vegetation Management Standards (FAC-003-3)). Electric cooperatives are required to manage vegetation located on power line rights-of-way (“ROW”) and minimize encroachments from vegetation located adjacent to the ROW to prevent the risk of vegetation-related outages that could lead to major outages and operational problems. Vegetation management techniques commonly used within the ROW, including using herbicides and mechanical mowing, are routine practices that might result in accidental, illegal “take” of the RPBB. NRECA is also concerned that the reach of utility infrastructure may be limited by this listing, meaning new member-consumers in rural areas may have delays in receiving utility services, and the siting and construction of additional infrastructure needed to preserve utility reliability may be prohibited or limited. NRECA members could be subject to additional requirements for their required National Environmental Policy Act (“NEPA”) analyses and ESA compliance, necessitating additional expenses and delays in activities undertaken to provide affordable and reliable service to consumers. NRECA members could also be challenged with additional costs and delays associated with obtaining incidental “take” permits. The importance of this issue and extent of potential impact require a national solution to ensure that electric cooperatives’ obligations can be met, while providing benefits to the RPBB.

II. Background

On January 31, 2013, the Xerces Society for Invertebrate Conservation filed with FWS a Petition to List the RPBB under the ESA. On September 18, 2015, FWS made an affirmative 90-day finding on the petition. 80 Fed. Reg. 56423. The Service issued a 12-month finding and proposed rule to list the RPBB as endangered and opened a 60-day public comment period on September 22, 2016. 81 Fed. Reg. 65324. From the time that FWS initiated the listing process until the comment period closed on November 21, 2016, it received nearly 93,000 comments. Yet, just 7 weeks later, on January 11, 2017, FWS issued a final rule listing the RPBB as endangered. 82 Fed. Reg. 3186. The Service justified the decision based almost entirely on a June 2016 report authored by its agency staff. *See* Final Report, Version 1, Rusty Patched Bumble Bee (*Bombus affinis*) Species Status Assessment (June 2016) (“June 2016 RPBB Status Report”). FWS scheduled the RPBB listing decision to take effect on February 10, 2017, 30 days after issuing the rule.

On January 20, 2017, the Trump Administration issued the Priebus Memorandum instructing the heads of all federal departments and agencies to stay the effective date of any final rule that had been issued before the Inauguration but not yet taken effect. While the Priebus Memorandum directed federal agencies to institute a minimum 60-day delay on the effective date of such “midnight” regulations “for the purpose of reviewing questions of fact, law, and policy,” it also instructed the agencies to “consider proposing for notice and comment a rule to delay the effective date of regulations beyond that 60-day period” and “consider potentially proposing further notice-and-comment rulemaking” for rules that raise questions of fact, law, and policy. Priebus Memorandum, Step 3. The Memorandum also allowed agencies to request exclusion of a regulation from this directive by notifying the Director of the Office of Management and Budget (“OMB”) that the effective date of a particular regulation should not be extended because the rule affects “critical health, safety, financial, or national security matters, or for some other reason.” *Id.*, Step 5. The OMB Director was required to “review any such notifications and determine whether such exclusion is appropriate under the circumstances.” *Id.*

On February 10, 2017, the day the RPBB listing decision was scheduled to take effect, FWS published notice in the Federal Register stating that the rule’s effective date was extended until March 21, 2017—the minimum required by the Priebus Memorandum for regulations that raise no substantial questions of fact, law, or policy. *See* 82 Fed. Reg. 10285.

III. Requested Relief and Justification

Petitioners request that, consistent with the provisions of the Priebus Memorandum, FWS extend the effective date of the final RPBB listing decision from March 21, 2017 to January 11, 2018. This additional time is warranted because the listing decision is unprecedented in its timing, scope, and lack of agency preparation to implement it, and because it squarely implicates important and complex issues of fact, law, and policy. This listing decision is precisely the type of rule for which the Priebus Memorandum encourages extended review periods and corresponding effective dates as well as supplemental notice-and-comment rulemaking. The brief initial postponement that FWS has provided, which the Trump Administration reserved only for those rules that raise “no substantial questions of law or policy,” is wholly inadequate. Priebus Memorandum, Step 3(a).

The Service has several options available for completing the requested extension before the current effective date of March 21, 2017 passes:

- 1) Issue an interim final rule pursuant to the Administrative Procedure Act's ("APA") "good cause" exception, 5 U.S.C. § 553(d), and subsequently provide an opportunity for public comment;
- 2) Issue a final rule with immediate applicability pursuant to the APA's "good cause" exception; or
- 3) Immediately publish a Notice of Proposed Rulemaking in the Federal Register and provide an abbreviated public comment period on the proposed new effective date followed by invocation of the APA's "good cause" exception to expedite finalization of the extension before March 21 if warranted.

Federal agencies routinely rely on each of these approaches to ensure compliance with applicable requirements of the APA. Based on its timing and needs, FWS could employ any one of them in response to this petition.

Petitioners seek this requested relief for several important reasons, each of which alone justifies extending the effective date and, if needed, invoking the APA's "good cause" exception to do so. First, the record suggests that the Service was more concerned with issuing a listing decision before Inauguration Day than it was with reaching the correct decision. The listing followed a meager seven-week period for FWS to consider the almost 93,000 public comments that the agency had amassed since initiating the listing process. To meet such a compressed timeline, the Service had little choice but to disregard the scores of substantive comments highlighting the deficient nature of its biological analysis, questioning the underlying studies and data, and pointing to additional sources of information that FWS had not evaluated. FWS gave short shrift to these significant comments, recycled text verbatim from its proposed listing decision, and simply relied on the same June 2016 RPBB Status Report that it had used to justify its initial listing proposal despite commenters having identified numerous problems with that report. An extension of the effective date therefore is necessary so that the Service may fully evaluate all of the information in the administrative record with the care and attention that listing a species under the ESA demands.

Second, the RPBB listing decision is premised more on uncertainty than on data. Both the June 2016 RPBB Status Report and FWS acknowledge extreme uncertainty about the species, including its behavior, habitat needs, and overall status. For example, while the proposed and final listing decisions made various assertions as to what the Service believes might be causing the asserted RPBB population declines, FWS admits that those causes are "uncertain," that key conclusions are "debatable," and that the scientific record is incomplete. *See, e.g.*, 81 Fed. Reg. at 65324, 65328, 65330 (conceding that "no studies specific to the [RPBB] have been conducted" to verify the potential impact of diseases and pathogens on the species; asserting that a particular pesticide product is "strongly implicated" as the major cause of asserted RPBB population declines, while simultaneously conceding that "most of the studies"

examining this class of pesticides were conducted on European honey bees, not bumblebees, and that “the overall toxicity of pesticides to rusty patched or other bumble bees is unknown”; and maintaining that “[h]abitat loss and degradation from residential and commercial development and agricultural conversion” pose “persistent and ongoing effects on the viability of” RPBB populations, but admitting that many researchers believe habitat loss “is unlikely to be” a key factor in asserted population declines of bees in North America); 82 Fed. Reg. 3186, 3189, 3190, 3204-05 (same). Rather than taking time to investigate these questions, test the agency’s theories and resolve the irreconcilable analysis underlying them, or better understand the species – time which FWS had available under the ESA’s species listing process – the Service issued a listing decision rooted in uncertainty, speculation, and inference. Extending the effective date of such a decision is imperative to allow the Trump Administration to evaluate the record and underlying data in the manner that the Obama Administration should have.

Third, the rush to issue a final listing for the RPBB left FWS regional and field office staff unprepared to implement a decision of this magnitude. The Service has openly acknowledged in conversations with Petitioners that there is insufficient understanding of the species and its behavior for biologists to reliably identify the RPBB’s belowground nesting and hibernation sites. As a result, FWS has not yet developed the customary survey protocols for locating the species, making it impossible for property owners and industry stakeholders to determine where the species might occur or evaluate whether activities planned within the species’ broad range might impact the RPBB. Without these survey protocols, public and private entities cannot undertake their work across at least thirteen states without risking a potential violation of the ESA, and those who already hold federal permits face the threat of having those permits rescinded until FWS-approved surveys can be performed.

This inequity to the regulated community is expected to persist for the foreseeable future. Petitioners have learned through outreach to the Service that FWS biologists are working to develop a RPBB survey protocol. But as we understand it, that protocol will not be finalized before the listing decision is scheduled to take effect on March 21, 2017. Even if the Service unexpectedly issues the survey protocol before that date, however, FWS has not received any applications from qualified biologists for permits that would allow them to perform RPBB surveys under Section 10(a)(1) of the ESA, 16 U.S.C. § 1539(a)(1). Once FWS receives any such application, it must publish notice in the Federal Register and provide a 30-day public comment period before issuing the requisite permit. And even then it is unreasonable to expect that there will be enough surveyors authorized to assess the tens of thousands of sites where projects and other activities are ready to begin across the RPBB’s multi-state range. As a result, many months will pass before any of these projects and activities can proceed across a significant portion of the U.S. without facing the real risk of an ESA violation. The only way to ensure compliance under these circumstances likely will be to delay or altogether abandon billions of dollars of work touching every major economic sector.

Further complicating the matter, the hurried issuance of the decision deprived FWS field offices throughout the RPBB’s range of the time necessary to coordinate a strategy for administering the listing. This is resulting in significant inconsistency in the field offices’ plans for reviewing activities that require consultation under Section 7 of the ESA, 16 U.S.C. § 1536. For example, Petitioners have learned that field offices in Ohio and West Virginia do not expect

to require RPBB surveys in 2017, but that one or both offices might require surveys in the future. In Pennsylvania, we understand that FWS might require surveys statewide despite that the only identified extant RPBB population occurs in Delaware County, in far Southeastern Pennsylvania. Meanwhile in Virginia, the Service plans to require surveys only in the counties where reported extant populations occur. This inconsistency not only is inefficient, it makes timely project planning impossible, particularly for interstate projects, such as pipelines, electric transmission lines, and highway projects. Numerous proposed interstate projects will be subject to these disparate requirements and will suffer unnecessary and expensive delays while the Service works to harmonize regulatory programs that should have been – and, under normal circumstances, likely would have been – coordinated before the listing decision was issued. Extension of the effective date will allow FWS’s field offices to perform the fundamental work required to prepare for implementing a listing decision of such breadth.⁶

IV. The Requested Relief Poses No Appreciable Risk to the RPBB

The requested extension should not significantly affect RPBB populations, as evidenced by FWS’s actions related to the species to-date. Indeed, the Service had numerous opportunities to expedite both the listing process and effective date of the final decision. That it has not done so (aside from prematurely issuing a half-complete listing decision in the waning days of the Obama Administration) supports a conclusion that the requested temporary extension will not pose an appreciable risk to the RPBB. The following examples illustrate this point.

First, when initiating the listing process for the RPBB, the Service did not invoke its authority to list the species on an emergency basis under Section 4(b)(7) of the ESA. 16 U.S.C. § 1533(b)(7). Under that authority, FWS may issue a listing decision for a species without first providing for public comment if the Service determines that there is “an emergency posing a significant risk to the well-being of [the] species.” *Id.* That FWS proceeded with the standard listing procedure for the RPBB – a process that took the Service nearly 17 months from the date of issuing its affirmative 90-day finding to the date of issuing the listing decision – rather than utilizing the emergency listing process, indicates that the temporary extension requested should not appreciably affect RPBB populations.

Second, upon issuing the final listing decision on January 11, 2017, FWS provided for a 30-day delay before the listing would take effect (on February 10, 2017). Had the Service believed that delaying the effective date posed a risk to the species, it could have exercised its regulatory authority under 50 C.F.R. § 424.18(b) to have the listing decision take effect sooner

⁶ This time also is necessary for the regulated community to begin incorporating the listing decision into project planning and to coordinate with FWS on appropriate conservation measures for the RPBB. Of primary concern to stakeholders from all industries is the possibility that the Service will impose time-of-year restrictions for conducting ground disturbing and vegetation management activities. FWS relies on seasonal restrictions on tree clearing as conservation measures to protect certain listed bat species, which has had costly and profound scheduling impacts on numerous industries. Such measures would be devastating if required for the RPBB given that the species can occur in a variety of habitats throughout its range year-round.

for “good cause.”⁷ That it did not do so belies any assertion that a brief postponement will imperil the RPBB.

Finally, on February 10, 2017, the date that the listing decision was scheduled to take effect, FWS and/or OMB declined to exclude the rule from the minimum 60-day delay under the Priebus Memorandum’s opt-out provision. That provision allowed FWS to notify “the OMB Director promptly of any regulations that . . . should be excluded from the directives in [the Memorandum] because those regulations affect critical health, safety, financial, or national security matters, or for some other reason.” Priebus Memorandum, Step 5. The OMB Director then would have been required to “review any such notifications.” *Id.* Given that FWS delayed the RPBB listing decision’s effective date until March 21, 2017 in response to the Priebus Memorandum, it is reasonable to conclude that there is no risk to the RPBB that warranted excluding the listing decision from the delay.

Moreover, irrespective of the Service’s past actions on the listing decision, the RPBB will continue to benefit from the ESA’s protections if FWS grants the extension that Petitioners request. Section 7(a)(4) of the statute will continue to apply during the extension period and require all federal agencies to “confer” with the Service on any proposed action that is “likely to jeopardize the continued existence of [the] species.” 16 U.S.C. § 1536(a)(4). The Service defines “jeopardize the continued existence of” to mean “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. The protections afforded under the Section 7(a)(4) conferencing requirement therefore will ensure the vitality of the RPBB while FWS closely evaluates the listing decision in accordance with the ESA’s standards.

For each of the above reasons, FWS should extend the effective date of the RPBB listing decision until January 11, 2018. Doing so will afford the Service’s staff the necessary time to carefully evaluate the information in the administrative record, verify whether an endangered listing is warranted after considering the analyses and new information presented in stakeholder comments, prepare a survey protocol and authorize a sufficient number of biologists to conduct those surveys, and develop a coordinated approach among its field offices for administering the listing. Absent such an extension, countless projects and activities from Minnesota to North Carolina to Maine likely will face a Hobson’s choice between delaying billions of dollars in planned economic activity or inviting a potential civil or criminal enforcement action.

In light of the severe financial, logistical, and societal impacts that will accrue if FWS does not extend the effective date of the listing decision, Petitioners respectfully seek the Service’s consideration of this petition on an emergency basis so that the agency may provide the requested relief before the listing takes effect on March 21, 2017. Given the emergency nature of this petition and the need for expeditious action to grant the relief requested, we will consider

⁷ Pursuant to 50 C.F.R. § 424.18(b)(1), a final listing decision may take effect “less than 30 days after it is published in the Federal Register” if FWS finds “good cause” for doing so and publishes that finding along with the rule.

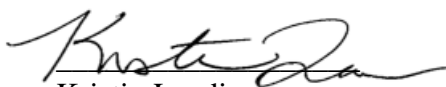
this petition denied if FWS does not publish notice of the proposed extension by **Friday, March 17, 2017**. Please direct any communications regarding this petition to:

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Respectfully Submitted,



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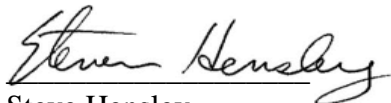
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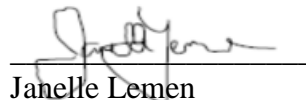
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