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January 20, 2023

VIA CERTIFIED MAIL (Return Receipt Requested)

Pete Buttigieg, Secretary
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20230

Deb Haaland, Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Martha Williams, Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

Billy Nolen, Administrator (Acting)
Federal Aviation Administration
800 Independence Avenue, SW
Washington, DC 20591

Omer Osman, Secretary
Illinois Department of Transportation
Division of Aeronautics
Hanley Building
2300 S. Dirksen Parkway
Springfield, IL 62764

The Greater Rockford Airport Authority
Board of Commissioners
Michael P. Dunn, Executive Director
60 Airport Drive
Rockford, IL 61109

Re: Supplement to NLI's December 10, 2021, Sixty-Day Notice of Violations of the Endangered Species Act relating to the Chicago Rockford International Airport's Expansion at Bell Bowl Prairie, Winnebago County, Illinois

Dear Officials:

I am counsel for the Natural Land Institute ("NLI") and, in that capacity, provide this supplement to NLI's sixty-day notice of violations of the Endangered Species Act that was sent on December 10, 2021 (the "Sixty-Day Letter"). *See* Exhibit 1.

In the Sixty-Day Letter, I provided written notice, pursuant to Section 11(g) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g)(2)(A)(i), that the United States Department of Transportation ("USDOT"), USDOT Secretary Pete Buttigieg, the Federal Aviation Administration ("FAA"), FAA Administrator (Acting) Billy Nolen, the United States Department of Interior ("USDOJ"), DOI Secretary Deb Haaland, the United States Fish and Wildlife Service ("USFWS") and USFWS Acting Director Martha Williams (collectively, the "Federal Defendants"), the Illinois

Department of Transportation (“IDOT”), and the Greater Rockford Airport Authority (“GRAA”) were in violation of Section 7 of the ESA, 16 U.S.C. § 1536, Section 9 of the ESA, 16 U.S.C. § 1538, and the ESA’s consultation regulations, 50 C.F.R. Part 402, concerning the Chicago Rockford International Airport (“RFD”) expansion at Bell Bowl Prairie, located in Winnebago County, Illinois. An earlier Sixty-Day of ESA violations was previously sent on December 10, 2021.

NLI intends to file a complaint in federal court in order to allege violations of the ESA because the Federal Defendants, IDOT, and GRAA have failed (and are continuing to fail) to ensure that their funding, authorization, construction, expansion and operation of RFD does not jeopardize the health and existence of the federally-listed endangered Rusty Patched Bumble Bee (*Bombus affinis*)—whose existence on Bell Bowl Prairie was confirmed on August 8, 2021—and have failed (and are continuing to fail) to ensure satisfaction of their ESA Section 7 obligations. Although not required by law, this letter also identifies the USFWS’ November 14, 2022 Letter of Concurrence (the “Letter of Concurrence”) (Exhibit 2) as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the ESA.

In particular, the Letter of Concurrence authorizes the destruction of 9.3 acres (6.95 acres degraded, 0.7 acre moderate and 1.67 acres high) of the remaining 15.5-acre Bell Bowl Prairie (9.7 acres degraded, 0.6 acre moderate and 5.2 acres high quality). Bell Bowl Prairie is one of the last remaining native, dry gravel remnant prairies located in Illinois. Such an authorization is incompatible with USFWS’ own conclusions as to why the very existence of the Rusty Patch Bumble Bee (the “Bee”) is in jeopardy. USFWS, for example, currently answers the central and critical question “*Why is the rusty patch bumble bee declining?*” as follows:

Habitat and degradation: Most prairies and grasslands of the Upper Midwest and Northeast have been converted to monoculture farms or developed areas, such as cities and roads. Grasslands that remain tend to be small and isolated.

U.S. Fish & Wildlife Service, *Rusty Patched Bumble Bee Fact Sheet*, available at https://www.fws.gov/sites/default/files/documents/508_RPBB-factsheet.pdf.

Notwithstanding this conclusion, USFWS is now—incomprehensibly—authorizing the type of development and construction on Bell Bowl Prairie (including road construction) that will lead to the extinction of the Bee. Indeed, the Letter of Concurrence directly undermines the USFWS’ own recovery plan for the Bee, released in July 2021. The key “recovery action” of this recovery plan for the Bee being promoted and purportedly implemented by USFWS is as follows:

Manage, protect, and enhance habitat. Successful management, protection, and enhancement measures may include the following:

- a. Maintain, improve, and restore overwintering, foraging, and nesting habitat.
- b. Restore habitat connectivity to enable dispersal.

- c. Develop and implement adaptive habitat management plans, considering monitoring results . . . and refine management.
- d. Create and implement habitat management incentive programs.
- e. Secure permanent protection of habitat through land acquisition or conservation easements.
- f. Conduct research to determine efficient and effective habitat management techniques.
- g. Manage habitat to improve resiliency to the effects of climate change.
- h. Provide outreach and education to the public and land managers to garner support for habitat conservation at local and regional levels.

U.S. Fish & Wildlife Service, *Recovery Plan for Rusty Patched Bumble Bee*, available at https://www.fws.gov/sites/default/files/documents/Final%20Recovery%20Plan%20Rusty%20Patched%20Bumble%20Bee_2021.pdf. In short, USFWS is now abdicating its role in protecting the Bee from extinction by authorizing the large-scale destruction of one of the last remaining Illinois prairies on which the Bee currently depends for sustenance, nesting, overwintering and survival.

The Federal Defendants are well aware that GRAA has agreed to halt the destruction of Bell Bowl Prairie only until the FAA completes its written re-evaluation of the November 25, 2019 FONSI—the exact timing of which the Federal Defendants, IDOT and the GRAA must disclose to NLI in compliance with a federal court’s instruction to do so.¹ Upon information and belief, that written re-evaluation may be completed shortly, at which time the Bee could still be hibernating and overwintering in Bell Bowl Prairie.

¹ On August 31, 2022, U.S. District Court Judge Ian Johnston instructed counsel for the Federal Defendants, IDOT and GRAA to provide adequate advance notice prior to any further construction on Bell Bowl Prairie (Exhibit 2 at 17:9-14) (emphasis added):

I think I have got judicial admissions from every defendant saying they are going to complete the Section 7 consultation process. **When they are done, they are going to get you notice. Email them the document ASAP. Get them notice in the best way possible. Call them. Give them a heads up.**

The Natural Land Institute

For 63 years, NLI has helped residents of northern Illinois conserve the land they cherish. NLI is one of the oldest private conservation groups in the Midwest. NLI is a member supported, nonprofit organization dedicated to preserving land and natural diversity for future generations. Since 1958, NLI has protected, managed, and restored 18,000 acres throughout Illinois and southern Wisconsin. These include prairies, forests, wetlands, and river corridors. Serving as a regional land trust, NLI accepts donations of properties, buys lands, manages natural areas, and helps landowners establish legal agreements that permanently limit harmful use and development.

The mission of NLI, described as follows, is to create an enduring legacy of natural land in northern Illinois for people, plants, and animals:

We are living at the time of man's final conquest over the wilderness. What we have saved, and what we may save in the next few years, will be all the true wild nature that will remain to pass on from generation to generation in the years ahead. There will never be another chance. *George B. Fell, founder of the Natural Land Institute*

The role of NLI includes both advocacy for land preservation and land-use planning and direct action to preserve areas by acquisition, either on its own or in conjunction with other organizations and agencies.

NLI has negotiated the acquisition of more than 100 tracts of land totaling 18,000 acres. A few of these areas include Harlem Hills Nature Preserve, Rockton Nature Preserve, Sugar River tracts, Nachusa Grasslands, Markham Prairie, Franklin Creek State Natural Area, Matthiessen State Park, Briggs Wetland, Apple River Canyon and the Castle Rock area. NLI currently owns and manages 26 preserves totaling 3,156.74 acres and holds 49 conservation easements on 3,814.15 acres.

Bell Bowl Prairie

NLI and Bell Bowl Prairie have been interconnected since NLI's founding. George B. Fell, NLI's founder, completed the first survey on July 26, 1968. Bell Bowl Prairie, a portion of which is an Illinois Natural Areas Inventory Site ("INAI"), has not only historic significance to Rockford from the days of World War I ("Camp Grant") and the Civilian Conservation Corps, but hosts a significant natural dry gravel prairie community that supports rare and endangered species. It is one of the few of these left in Illinois and many migratory birds rest there on their journey, attracting birders from across the Midwest. NLI's founder, George Fell, fought to protect this piece of our historic Illinois landscape and at one time saved it from the bulldozers.

NLI and its many partners have a long history of stewarding the Bell Bowl Prairie. With its partners from the Byron Forest Preserve District, the Illinois Department of Natural Resources ("IDNR"), the Boone County Conservation District, the Forest Preserves of Winnebago County, the Rockford Park District, the Winnebago County Soil and Water Conservation District, Pheasants Forever, The Nature Conservancy and others, NLI has participated in and coordinated stewardship days over the years to clear out invasive species and protect the site's natural diversity. There are

many ecological benefits the community receives from this rare and remnant habitat. Less than 1/100th of 1% of Illinois' native prairie landscape remains.

In 2019, the Greater Rockford Airport Authority ("GRAA") proposed construction on BBP in order to expand the airport. The GRAA was required by the FAA to prepare an Environmental Assessment ("EA") report in conformance with the applicable section of the FAA's Order 5050.4B, NEPA "Implementing Instructions for Airport Actions," dated April 26, 2006 and FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures," dated July 16, 2015. The GRAA's project consultant, Crawford, Murphy & Tilly, Inc. ("CMT"), prepared the Final EA in conjunction with the FAA for the GRAA. Based on this EA, the FAA issued a FONSI on November 25, 2019, that authorized construction on BBP.

Nearly two years later, on August 8, 2021, an Illinois Department of Natural Resources ("IDNR") biologist confirmed the existence of the Rusty Patched Bumble Bee (*Bombus affinis*) (the "Bee") on Bell Bowl Prairie. The USFWS has listed the Bee as an "endangered species" under the ESA. See Endangered Species Status for Rusty Patched Bumble Bee, 82 Fed. Reg. 3186, 3205 (Jan. 11, 2017).

Prior Litigation Pertaining to the Airport Expansion and Bell Bowl Prairie

In the Fall of 2021, NLI learned that the Federal Defendants had authorized the destruction of Bell Bowl Prairie by the GRAA, notwithstanding the fact that the Bee's existence on Bell Bowl Prairie had been confirmed only two months earlier. In particular, on September 21, 2022, USFWS sent IDOT (to which the FAA, presumably, delegated its authority) a letter in which USFWS authorized the destruction of Bell Bowl Prairie:

We have reviewed the September 20, 2021, Natural Resources Review (NRR) memo seq. 22034 – Rockford International Airport, Winnebago County, Illinois, and have the following comments. The proposed project involves construction of a new Air Cargo Development on the south side of the airport. New buildings, aircraft parking, aprons, taxiways and employee parking will be constructed. All work will remain on airport property. The improvement will not require land acquisition, in-stream work or tree removal. Land cover in the vicinity of the proposed improvement is primarily agricultural land with a large active commercial airfield to the north.

ILLDOT has reviewed the list of threatened or endangered species which may be present in Winnebago County and has determined that there may be suitable habitat in the project area for the Rusty Patched Bumble Bee. A mowing date restriction, referenced in the NRR, will be included to avoid direct impacts to this species. We concur with your determination that the project is not likely to adversely affect this species with the mowing restriction in place.

Adverse impacts to wetlands are not expected. The NRR adequately addresses the potential impacts of the project alternatives on fish and wildlife resources and federally listed threatened and endangered species in the project area. This precludes the need for further action on this project as required under Section 7 of the Endangered Species Act of 1973, as amended. Should this project be modified or new information indicate endangered species may be affected, consultation should be initiated.

The USFWS letter did not even acknowledge that the Bee had actually been identified as existing *on* Bell Bowl Prairie. *Id.* (“there *may* be suitable habitat in the project area for the Rusty Patched Bumble Bee”) (emphasis added).

Due to the Federal Defendants’ inexplicable inaction to protect the health and existence of the Bee at Bell Bowl Prairie, NLI was forced to file a complaint in the U.S. District Court for the Northern District of Illinois (Western Division) (Case No. 21-cv-50410) (Dkt. 1) against the Federal Defendants—in addition to the GRAA—on October 26, 2021, and a Motion for Temporary Restraining Order and/or Preliminary Injunction (Dkt. 5) on October 27, 2021, to stop the bulldozing activities that were scheduled to begin on Bell Bowl Prairie on November 1, 2021. It was only when the GRAA agreed to temporarily stop construction activities on Bell Bowl Prairie until March 1, 2022, that NLI agreed to withdraw its Motion, without prejudice.

In conjunction with its agreement to temporarily halt construction activities on Bell Bowl Prairie, RFD issued a media release on October 28, 2021, that stated, in pertinent part, as follows:

Chicago Rockford International Airport (RFD) officials today announced it is in the process of redesigning a portion of its expansion project which will remove a detention basin that was originally planned in the Bell Bowl Prairie. Additionally, construction that was previously on hold until November 1 will be suspended within the Bell Bowl Prairie until Federal Aviation Administration (FAA) consultation activities with the US Fish & Wildlife Service (USFWS) are concluded.

In consultation with the FAA and USFWS, the capacity of the planned Bell Bowl Prairie detention basin will be replaced by other planned basins on RFD grounds.

“During the coming months, we will continue to work with the FAA, IDNR, and the USFWS to ensure the project continues and we can plan and develop in compliance with the Federal and state regulations for the endangered species,” said Zack Oakley, the Deputy Director of Operations and Planning at RFD. “The FAA is reinitiating consultation under the Endangered Species Act with the USFWS to evaluate impacts to the Rusty Patched Bumble Bee, so planned construction initially scheduled to continue on November 1 will be suspended until

further consultation is completed. We anticipate the resumption of the project in the spring of 2022.

On November 9, 2021, RFD issued another media release that stated, in pertinent part, as follows:

Chicago Rockford International Airport (RFD) continues to work with the Federal Aviation Administration (FAA), the Illinois Department of Natural Resources (IDNR), and the US Fish & Wildlife Service (USFWS) to further evaluate the environmental impact, if any, of the Airport's critical need to use land for major economic development of a \$50 million cargo expansion project.

As a result of ongoing consultation with the FAA, USFWS and the IDNR, further construction of the long-planned and approved roadway is paused until this consultation is completed. Until this consultation is completed, RFD will limit access to the land being evaluated to ensure preservation and safety on airport property.

On November 18, 2021, the IDNR sent a letter to the FAA regarding the consultation process insofar as it addresses Illinois law, in pertinent part, as follows:

The Department has received your submission for this project for the purposes of consultation pursuant to the *Illinois Endangered Species Protection Act* [520 ILCS 10/11], the *Illinois Natural Areas Preservation Act* [525 ILCS 30/17], and Title 17 *Illinois Administrative Code* Part 1075.

The proposed action being reviewed in this letter consists of the construction of a new Air Cargo Development at Rockford International Airport, which includes the construction of buildings, aircraft parking aprons, taxiways, employee parking areas, and auto street improvements in an area known as the Midfield. (42.190°, -89.100°). This project was previously reviewed in a letter dated November 28, 2018 (EcoCAT #1905066). This consultation was reopened and assigned a new project number (EcoCAT #2202395), as the original consultation had expired and new information regarding protected resources in the project area was made available. An initial response was provided on August 13, 2021.

Rusty-Patched Bumble Bee

On August 8, 2021, the state listed rusty-patched bumble bee was identified within the Bell Bowl Prairie INAI site. To avoid adverse

impacts to the rusty-patched bumblebee, the Department recommends the following:

- A survey and habitat assessment should be conducted to determine if the bee is using this site and in what capacity, i.e., nesting, foraging, and/or overwintering habitat. A survey proposal should be sent the Department for concurrence on methods, along with the results for a final determination of impact.
- If foraging habitat is identified, any work that disturbs the ground or may remove flowering plants should be done between November 1st and April 1st of any year to prevent impacts to foraging bees.
- Coordination with the U.S. Fish and Wildlife Service may be necessary for this species and is separate from state regulations due to its federal status.
- Alternatively, the applicant may assume the presence and potential adverse impacts to the rusty-patched bumble bee and seek an Incidental Take Authorization pursuant to Part 1080 and Section 5.5 of the *Illinois Endangered Species Protection Act**. Please note, if the U.S. Fish and Wildlife Service has determined that a Habitat Conservation Plan and Incidental Take Permit are required pursuant to Section 10 of the Federal Endangered Species Act, the Department cannot issue an Illinois Incidental Take Authorization until the U.S. Fish and Wildlife Service has completed its Habitat Conservation Plan and/or Federal Incidental Take Permit.

Bell Bowl Prairie INAI

Due to the unique quality and rare nature of the Bell Bowl Prairie INAI site, as one of the few remaining Dry Gravel Prairie Communities in Illinois, the Department recommends that impacts to this INAI site be avoided the extent practicable. If impacts cannot be avoided, the Department requests the opportunity to collect seeds and translocate plants and prairie materials to a preapproved site. The Department looks forward to continued coordination on future activities proposed at this site. Please contact the Division of Natural Heritage and/or the Illinois Nature Preserves Commission for questions or assistance with any natural resource concerns. The Department welcomes a meeting to

discuss practicable alternatives to the proposed action that would avoid or minimize impacts to protected resources.

On April 18, 2022, the FAA provided USFWS with a draft Biological Assessment for review and concurrence. On June 16, 2022, USFWS requested the FAA provide a final version, which USFWS subsequently received on June 22, 2022. On August 4, 2022, USFWS provided the FAA with clarification on the Bee consultation guidance. Based on the guidance clarification, the FAA began preparing a revised final Biological Assessment.

On August 25, 2022, counsel for NLI provided counsel for the Federal Defendants and the GRAA a report from Geosyntec Consultants (“Geosyntec”), regarding the FAA draft Biological Assessment and the various “alternatives” for the airport expansion that would minimize or avoid impacts to the remaining high-quality sections of the Bell Bowl Prairie, as well as minimize impacts to adjacent lower quality prairie segments. Exhibit 3. The report concluded, in pertinent part, as follows:

Alternative 3 (as modified to address the capacity constraints stated by the applicant) is, by far, the best individual option for avoiding prairie impacts. If alternatives can be combined, and the roadway design limitations of alternatives 4 and 5 can be overcome with the remedies suggested above, the ideal design alternative would be to combine the moving of the cargo building with an option involving an eastern or southeastern road location. This would both avoid the high-quality prairie and maximize overall prairie protection.

In addition to the consideration of project design alternatives, other mitigations should be addressed to minimize indirect impacts to the prairie. For example, to the extent feasible, salt spray from pavement deicing operations should be minimized by using innovative practices and/or installing seasonal barrier screens. Additionally, a landscaped buffer zone around the protected prairie should be clearly delineated and a plan developed for buffer and prairie access, long-term protection, and ecological stewardship. Some of these items are addressed in Section 5.1: Conservation Measures. It is recommended that ecologists from NLI and its partners review this section thoroughly with respect to the long-term objectives of protecting the ecological viability of Bell Bowl Prairie.

Ex. 3 at 4-5.

On August 31, 2022, the U.S. District Court for the Northern District of Illinois held a hearing regarding NLI’s pending complaint. During the hearing, counsel for GRAA represented to the court as follows:

The airport has previously informed the Court and NLI and all the parties that it will not proceed with any construction activity on the

affected area, being the Bell Bowl Prairie, until after the FAA concludes the Section 7 consultation process and issues its final decision, of which I have seen correspondence where the FAA has informed Mr. Russell that he will be provided with a copy of the final decision as soon as it is in.

Ex. 2 at 14:10-17. Counsel for the Federal Defendants represented to the court as follows:

[T]he agencies are currently in the process of doing a written reevaluation of the November 2019 FONSI. That written reevaluation is going to look at three things. First, it is going to consider the Endangered Species Act review of the rusty patched bumble bee. It is going to incorporate that ESA consultation, which is currently ongoing and is nearly concluded. Second, it is going to look at changes in the project that the airport has proposed since the last time this project was permitted. And, third, it is going to review environmental assessment from IDNR. IDNR is currently looking at state-protected species in the area, and we don't have a timeline for when that review is going to be complete, and we don't know what it is going to say. So we are not entirely sure when our own written reevaluation will be complete. . . . Once that written reevaluation is done, it will either result in a final determination that the project can go forward, in which case there will be a new final agency action that will trigger a 60-day window to review in the court of appeals, or the written reevaluation will determine that a supplemental environmental assessment is necessary, in which case there is more environmental review to be done, and we are looking at sometime stretched out certainly into 2023 before the final order would issue.

Id. 2 at 15:9-17:6. Based on these representations, the court instructed counsel for the Federal Defendants and GRAA as follows:

All right. I think I have got judicial admissions from every defendant saying they are going to complete the Section 7 consultation process. When they are done, they are going to get you notice. Email them the document ASAP. Get them notice in the best way possible. Call them. Give them a heads up.

Id. at 17:9-14. After the Court assured counsel for NLI that “you are going to get notice” regarding any potential construction on Bell Bowl Prairie (*id.* at 17-15), the Court proceeded to dismiss NLI’s Complaint without prejudice (Dkt. 74).

On October 21, 2022, the FAA sent its final Biological Assessment for the Rusty Patched Bumble Bee (the “BA”) to USFWS. In pertinent part, the BA identified the “preferred alternative” (“Alternative 2”) by which airport expansion at Bell Bowl Prairie would proceed. This “preferred

alternative” would result in the destruction of 15.5 acres of the original 21.7 acres of Bell Bowl Prairie:

Of the original 21.7 acres of prairie, the Action would permanently impact a total of 15.5 acres of the prairie within the Action Area. As noted above, approximately 6.2 acres (2.6 acres degraded, 3.6 acres moderate and 0 acre high quality) of the prairie was disturbed prior to August 2021, and the Future Prairie Impact Area would include permanent impacts of 9.3 acres (6.95 acres degraded, 0.7 acre moderate and 1.67 acres high) to the remaining 15.5-acre (9.7 acres degraded, 0.6 acre moderate and 5.2 acres high quality) prairie.

BA at 8, 11. The BA identifies the “direct effects” of the “preferred alternative”—including loss of habitat, contact with construction equipment and/or personnel, and hazardous material and chemical spills—as follows:

Approximately 9.3 acres of existing potential foraging habitat and 4.6 acres of existing potential nesting habitat would be permanently lost as a result of the Action. Construction of an access road, aircraft parking, and air cargo facilities in the Action Area will result in permanent conversion of foraging and nesting habitat to mowed turf-grass with compacted soil and an impermeable asphalt surface devoid of pollen and nectar resources. . . . Loss of nesting sites in close proximity to floral resources may result in avoidance of the area, deterioration in bumble bee body condition, and reduction in reproductive output due to the need to find appropriate nesting habitat elsewhere (USFWS 2021). . . .

The Action would also directly reduce a portion of available nectar plant density for the rusty patched bumble bee. If severe enough, reduction or elimination of nectar plant density or diversity has the potential to result in the bee’s inability to find suitable amounts of nectar and pollen which may cause avoidance of the area, potential deterioration of body condition, and reduced or no reproductive output for affected queens (USFWS 2021). . . . Of the 15.5 acre remaining existing prairie, 9.3 acres (60%) would be impacted by the Action within the Action Area.

Construction activities have the potential to harm or harass the rusty patched bumble bee if individuals are present within or enter the Action Area during construction. Bees could come into direct contact with construction equipment and/or personnel. . . . Construction related disturbances such as increased vibration levels have the potential to result in alteration of normal foraging and nesting behavior. Ground

disturbance or compaction also have the potential to result in immediate death or harm of individuals present in nests.

Hazardous materials and chemicals in the form of gasoline, engine oil, lubricants or other fluids used during construction activities have the potential to be unintentionally released or spilled due to seepage or accidental spills. Rusty patched bumble bee individuals could come into contact with these materials if they are searching for nectar and pollen resources within the Action Area. Accidental release of hazardous materials into the environment may potentially impact growth of floral resources for the bee in the immediate vicinity of the Action Area.

Id. at 29.

With regard to “Determination of Effect,” the BA concludes as follows, in pertinent part:

Appropriate forage and nesting habitat for the rusty patched bumble bee (*B. affinis*) was identified within the Action Area. Because appropriate habitat is available, rusty patched bumble bees were documented foraging within the prairie in 2021, and multiple HPZs for the rusty patched bumble bee are located within 10 km of the Action Area, it is likely that the bee may forage and/or nest within the Action Area. The nature of the action and the conservation measures proposed below in this Biological Assessment ensures the action is not likely to adversely affect the species.

Considering that the project plans have been revised to the extent that impacts to rusty patched bumble bee have been significantly reduced, the proximity and quality of habitat available within 10 km of the Action Area, including four other HPZs, and the implementation of the conservation measures as described below, we conclude that the Action may affect, but is not likely to adversely affect the rusty patched bumble bee. For the same reasons, the Action would not jeopardize the continued existence of the species.

The Action is not likely to result in incidental take as discussed below, including consideration of the timing of the ground disturbance prior to the flight and nesting season and the lack of overwintering habitat present within the Action Area.

Id. at 35.

With regard to “Conservation Measures,” the BA identified those as follows:

The Airport will implement the following conservation measures to minimize the potential effects to the rusty patched bumble bee:

1. Ground disturbance activities within the Action Area will occur during a consecutive calendar period from October 15 to March 15 to prevent floral resources from blooming and nesting of the rusty patched bumble bee within the Action Area.
2. No construction parking or staging shall occur within the 6.2 acre prairie remaining after the Action.
3. Erosion control shall be implemented as specified in the Stormwater Pollution Prevention Plan.
4. The Action has been redesigned to avoid impact to 6.2 acres (3.6 acres high quality and 2.6 acres degraded) of existing Bell Bowl Prairie. The 6.2 acres will remain after the Action.
 - a. To prohibit encroachment during construction, the 6.2 acre remaining prairie shall be demarcated by posted signs and temporary silt fence around the perimeter of the prairie during construction in the Action Area.
 - b. No construction work or other disturbance shall occur within the 6.2 acre remaining prairie. All temporary sedimentation and erosion control and signs shall be removed when construction is complete.
5. Routine maintenance of the 6.2 acre remaining prairie will be added to the Airport's Asset Management System and will include the following activities:
 - a. During the first winter season post-construction (October 15 – March 15) woody encroachment will be removed mechanically in a manner as to not disrupt the prairie substrate. Heavy machinery shall not be used.
 - b. Vegetation shall be mowed once annually after the bumble bee active flight season (October 15 – March 15) to discourage woody plant establishment and encourage herbaceous growth.
 - c. Targeted spot treatment with herbicide will be used as needed to limit woody plant establishment. The herbicide shall be applied on the cut stumps following label instructions and shall not be broadcast sprayed.

- d. Every three years, woody encroachment shall be monitored and removed mechanically as necessary between October 15 – March 15 in a manner as to not disrupt the prairie substrate. Heavy machinery shall not be used.
6. Insecticide use will not be permitted within the 6.2 acre remaining prairie or in the adjacent mowed and hay field areas.

Id. at 35-36.

On November 14, 2022, following review of the BA, the USFWS sent FAA a letter (the “Letter of Concurrence”) in which it concurred with the FAA as follows, in pertinent part:

Based on the August 8, 2021, identification of RPBB within the project area, the Airport modified project actions to be more protective of rusty patched bumble bee resources. The Airport revised project plans to the extent that impacts to the RPBB are not likely to occur from the project. We agree that, as stated in the BA, Section 5, significantly larger habitat complexes suitable for rusty patched bumble bee foraging, nesting, and overwintering exist within 10 km of the Action Area, which are likely preferable to the species due to available habitat conditions, proximity of the HPZs to one another and larger flight and foraging corridors.

These complexes overlap with four other HPZs and are located along the Fox and Kishwaukee river corridors, as well as managed and protected natural areas including several parks within the Winnebago Forest Preserve system. The Action Area is equivalent to approximately 0.8% of the foraging and nesting habitat available within a 10 km radius. The best apparent habitat complex within a HPZ is located approximately 5.5 km to the west and includes approximately 108 acres of foraging, 726 acres of nesting, and 1,438 acres of overwintering habitat, based on the analysis described in Section 2.2.5 of the BA. The complex is partially within Severson Dells Forest Preserve, Funderburg Forest Preserve, an active prairie restoration site, Levi and Ester Fuller Memorial Forest Preserve, and Howard Colman Hall Creek Preserve.

It is, therefore, reasonable to assume that because of the landscape context of the Action Area and the proximity of preferable and larger habitat complexes, this Action's removal of foraging and nesting habitat within the Action Area would not be expected to rise to an adverse effect and is considered to be an insignificant and discountable effect. Our review of this BA included consideration of the current overall declining status of the RPBB and the inferred condition of the

species within the action area (environmental baseline). We then assessed the effects of the proposed action and the potential for cumulative effects in the action area on individuals, the affected populations, and the species as a whole.

Based on the analysis presented in the BA and the implementation of the conservation measures described below, and included in the BA, the Service concurs with the FAA's determination that the revised proposed actions are “not likely to adversely affect” the RPBB. Should FAA or the Airport modify the project, or new information indicate federally listed species may be affected, consultation should be reinitiated.

It is our understanding that the following conservation measures will be listed in the Written Re-Evaluation of the 2019 Environmental Analysis to be completed by FAA after the completion of consultation with the USFWS and Illinois Department of Natural Resources (ILDNR). The Written Re-Evaluation is the NEPA process the FAA uses to determine if the conclusions reached within the original NEPA document stand or if supplemental NEPA documentation must be completed. These conservation measures will be listed as Airport responsibilities. Any failure to complete these measures could put the Airport in grant assurance violation.

[O]ur conclusions are based on our independent review of the Revised BA and our findings that the BA is considers the appropriate statutory and regulatory factors and is supported by the best available scientific data. We therefore concur with FAA's determination that the project, as described in the Revised BA with incorporation of the conservation measures, is not likely to adversely affect the RPBB . . .

Exhibit 2.

The USFWS’ “Letter of Concurrence” is legally flawed and violates the ESA and, as such, any FAA decision or action on which it is based violates the ESA.

I. LEGAL BACKGROUND OF THE ESA

Congress enacted the ESA in 1973 to provide for the conservation of endangered and threatened fish, wildlife, plants, and their natural habitats.² The ESA was enacted, in part, to provide a “means whereby the ecosystems upon which endangered species and threatened species depend

² 16 U.S.C. §§ 1531, 1532.

may be conserved...[and] a program for the conservation of such endangered species and threatened species....”³

The ESA imposes substantive and procedural obligations on all federal agencies, including delegates of the FAA, to ensure that their programs and activities are in compliance with the ESA.

The ESA vests primary responsibility for administering and enforcing the statute with the Secretaries of Commerce and the Interior. The Secretaries of Commerce and the Interior have delegated this responsibility to the National Marine Fisheries Service and the USFWS respectively.⁴ USFWS has responsibility for actions that may affect the Bee.

In order to fulfill the substantive purposes of the ESA, federal agencies are required to engage in consultation with USFWS to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or . . . result in the adverse modification of habitat of such species . . . determined . . . to be critical”⁵ Through consultation under Section 7, agencies work with USFWS to determine whether their actions will jeopardize listed species’ survival, or adversely modify designated critical habitat, and, if so, identify ways to modify the action to avoid that result.⁶

Section 7 consultation is required for “any action [that] may affect listed species or critical habitat.”⁷ Agency “action” is broadly defined in the ESA’s implementing regulations to include “(b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.”⁸

For each federal action, the agency must ask the USFWS whether any listed or proposed species may be present in the area of the agency action.⁹ If listed or proposed species may be present, the agency must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action.¹⁰

If an agency determines that its action “may affect” but is “not likely to adversely affect” a listed species or its critical habitat, the regulations permit “informal consultation,” during which USFWS must concur in writing with the agency’s determination.¹¹ If the agency determines that its action is “likely to adversely affect” a listed species or critical habitat, or if USFWS does not concur with the agency’s “not likely to adversely affect” determination, the agency must engage in “formal

³ 16 U.S.C. §§ 1531-1544; 16 U.S.C. § 1531(b).

⁴ 50 C.F.R. § 402.01(b).

⁵ 16 U.S.C. § 1536(a)(2) (“Section 7 consultation”).

⁶ 50 C.F.R. § 402.14(a).

⁷ 50 C.F.R. § 402.14.

⁸ 50 C.F.R. § 402.02.

⁹ 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12.

¹⁰ *Id.*

¹¹ 50 C.F.R. § 402.14(a)-(b).

consultation,” as outlined in 50 C.F.R. § 402.14 (“General Formal Consultation”).¹² An agency is relieved of the obligation to consult on its actions only where the action will have “no effect” on listed species or designated critical habitat. Effects determinations are based on the direct, indirect, and cumulative effects of the action when added to the environmental baseline and other interrelated and interdependent actions.¹³ Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.¹⁴

To complete formal consultation, USFWS must provide the agency with a “biological opinion” explaining how the proposed action will affect the listed species or habitat.¹⁵ If USFWS concludes that the proposed action “will jeopardize the continued existence” of a listed species, the biological opinion must outline “reasonable and prudent alternatives.”¹⁶ USFWS may also “suggest modifications” to the action (called reasonable and prudent measures) during the course of consultation to “avoid the likelihood of adverse effects” to the listed species even when not necessary to avoid jeopardy.¹⁷

If the biological opinion concludes that the action is not likely to jeopardize the continued existence of a listed species, and will not result in the destruction or adverse modification of critical habitat, USFWS must provide an “incidental take statement,” specifying the amount or extent of such incidental taking on the listed species, any “reasonable and prudent measures” that USFWS considers necessary or appropriate to minimize such impact, and setting forth the “terms and conditions” that must be complied with by FAA to implement those measures.¹⁸

Taking of listed species without the coverage of an incidental take statement is a violation of Section 9 of the ESA.¹⁹ Section 9 of the ESA prohibits any person, including federal agencies, from taking any endangered or threatened species.²⁰ The term “take” is defined broadly to include “harass, harm, pursue, hunt, shoot, wound, trap, kill, capture, or collect, or to attempt to engage in any such conduct.”²¹ “Harm” is further defined as “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”²² Thus, an action which indirectly (*e.g.*, habitat modification) or directly causes a decline in the population of an endangered species harms that species.

¹² 50 C.F.R. §§ 402.02, 402.14(a).

¹³ 50 C.F.R. § 402.02 (definition of “effects of the action”).

¹⁴ *Id.*

¹⁵ 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14.

¹⁶ 16 U.S.C. § 1536(b)(3)(A).

¹⁷ 50 C.F.R. § 402.13.

¹⁸ 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

¹⁹ 16 U.S.C. § 1538(a)(1)(B).

²⁰ 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.21(c).

²¹ 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3.

²² 50 C.F.R. § 17.3.

The ESA requires agencies to use the best scientific and commercial data available when consulting about whether federal actions may jeopardize listed species or adversely modify critical habitat.²³ Accordingly, an action agency must “provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species of critical habitat.”²⁴ Likewise, “[i]n formulating its biological opinion...the Service will use the best scientific and commercial data available.”²⁵ If the action agency fails to discuss information that would undercut the consultation, it is legally flawed.²⁶

Until completion of appropriate consultation, FAA is prohibited from making any irreversible or irretrievable commitment of resources with respect to RFD which may foreclose the formulation or implementation of any reasonable and prudent alternative measures.²⁷ The purpose of Section 7(d) is to maintain the status quo pending the completion of consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to the species or adverse modification of its critical habitat.

Section 7(a)(1) of the ESA requires federal agencies to “utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species listed” under the Act. 16 U.S.C. § 1536(a)(1). Section 7(a)(1) “contains a congressional directive that agencies must act affirmatively in the interest of listed species.” *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy*, 898 F.2d 1410, 1417 (9th Cir. 1990); *see also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 181–183 (1978) (noting that the final version of the ESA “carefully omitted” phrases such as “insofar as is practicable and consistent with the [agency’s] primary purposes,” which might have qualified an agency’s responsibility). A program carried out the purpose of “conservation” brings a listed species to the point of recovery and delisting. 16 U.S.C. § 2532(3). Furthermore, federal agencies do not satisfy their Section 7(a)(1) duties when their conservation measures are insignificant and “do[] not, or [are] not reasonably likely to, conserve [listed] species.” *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1446–1447 (11th Cir. 2008). An agency’s conservation efforts may be so ineffective that they amount to “total inaction” and violate Section 7(a)(1). *Id.*

II. THE RUSTY PATCHED BUMBLE BEE

The USFWS listed the Bee as endangered, meaning it is in danger of becoming extinct, on March 21, 2017.²⁸ This species, which was once widely found in the upper Midwest was described by USFWS as “so imperiled that every remaining population is important for the continued existence of the species”²⁹

²³ 16 U.S.C. § 1536(a)(2).

²⁴ 50 C.F.R. § 402.14(d).

²⁵ 50 C.F.R. § 402.14(g)(8).

²⁶ *See Ctr. For Biological Diversity v. B>M*, 698 F.3d 1101, 1127-28 (9th Cir. 2012).

²⁷ 16 U.S.C. § 1536(d).

²⁸ 16 U.S.C. § 1532(6).

²⁹ U.S. Fish & Wildlife Service, Survey Protocols for the Rusty Patched Bumble Bee (*Bombus affinis*), Version 1.2 (June 6, 2017) at 1 (“FWS Survey Protocols”).

The numbers of the Bee have sharply declined throughout its range, declining by an estimated 91 percent since the mid- to late-1990s. Most of its grassland and prairie habitat has been lost, degraded, or fragmented by conversion to other uses, including highways and other developments. Other threats to the Bee include exposure to pesticides, effects of climate change, effects of extremely small populations, disease, and a combination of these factors.

The Bee is a pollinator that contributes to the healthy functioning of our ecosystems and contributes to our food security. Bumble bees are keystone species necessary for native wildflower reproduction and for creating seeds and fruits that feed wildlife, including songbirds. Bumble bees are also important pollinators of crops such as cranberries, blueberries, plums, and apples.

The Bee lives underground throughout the year as solitary queens or in colonies that the queen initiates in the spring. Throughout its active season, early spring (at least beginning of April) to mid-Fall (September/October),³⁰ it is essential that the Bee have access to diverse and abundant floral resources to forage for nectar and pollen.³¹ Key features of its habitat include the diverse and abundant flowering plants near areas that are “predominantly free from ground-disturbing activities that may function as overwintering sites for hibernating queens.” Overwintering habitat “may typically be in uncompacted and often sandy, moss-covered soils,” often in abandoned rodent nests.³²

In short, the Bee may well be overwintering and hibernating in Bell Bowl Prairie right now and, accordingly, will continue to do so until after the FAA completes its written re-evaluation.

III. THE ESA VIOLATIONS

The Federal Defendants, IDOT, and GRAA have failed to prevent the imminent destruction of Bell Bowl Prairie and the destruction of the Bee, which may now be overwintering or hibernating on Bell Bowl Prairie. Indeed, the Federal Defendants and IDOT have authorized development and construction activities by GRAA that would result in the large-scale destruction of Bell Bowl Prairie and jeopardize the welfare and existence of the Bee. It has only been through NLI’s prior action in federal court for injunctive relief that further irreparable harm has not already been caused to the Bee and Bell Bowl Prairie after the Bee’s discovery on August 8, 2021. However, irreparable harm will be inflicted on the Bee and Bell Bowl Prairie if the Federal Defendants, IDOT, and GRAA continue on their current course and authorize the GRAA to bulldoze and irrevocably destroy most of Bell Bowl Prairie.

Since the Bee’s discovery at Bell Bowl Prairie, the Federal Defendants, IDOT, and GRAA have been in violation of the ESA because they have failed to ensure their funding, authorization, construction, expansion and operation of RFD does not jeopardize the continued existence of the Bee. Although they may now point to the FAA’s October 2022 BA and the USFWS’ November 14, 2022,

³⁰ U.S. Fish and Wildlife Service, 2017. The Rusty Patched Bumble Bee (*Bombus affinis*), Interagency Cooperation under Section 7(a)(2) of the Endangered Species Act Voluntary Implementation Guidance, Version 1.1 at 8-9 (“FWS Bombus ESA Guidance”).

³¹ *Id.* at 8.

³² *Id.* at 9-10.

Letter of Concurrence as satisfying their ESA Section 7 obligations, those two documents reflect arbitrary, capricious and incomplete consideration and analysis of all the relevant factors regarding the Bee's existence and dependence on Bell Bowl Prairie. The conclusions in those documents run counter to the evidence before the FAA and the USFWS regarding the Bee's dependence on Bell Bowl Prairie for survival and its continuing existence.

The Federal Defendants' Unwarranted Reliance on "Other Habitat." Both the BA and the Letter of Concurrence rely heavily on the fact that there is, purportedly, other suitable habitat for the Bee in the general vicinity of the airport. For instance, the BA states that, due to the existence of this other habitat, "the Action would not jeopardize the continued existence of the species." As a result, the Federal Defendants argue Bell Bowl Prairie can be destroyed or otherwise significantly degraded even though "it is likely that the bee may forage and/or nest within [Bell Bowl Prairie]." However, the ESA does not permit USFWS to evaluate specific endangered species takings on the basis of whether they will lead to wholesale species extinction. Instead, USFWS, through Section 7 consultation, must ask whether this project is likely to adversely affect this population of this endangered species. The answer to this question, as the consultation process has shown, is that the project will, by design, impact the Bee's habitat, and would lead to mortality. Also, despite the argument that other habitat exists in the region, the Letter of Concurrence is explicit that Bell Bowl Prairie is the only habitat in the immediate vicinity, and that the proposed action would remove the majority of the habitat. The BA and Letter of Concurrence make it clear that effects on the species will take place—at minimum, through removal of foraging and nesting resources. Although USFWS has identified "habitat loss" as a leading driver of decline for this species, when habitat loss is certain to occur, USFWS is now not willing to say that this will negatively affect a species threatened with extinction, by habitat loss.

Overwintering: The Federal Defendants admit that "[l]ittle is known about overwintering preferences of bumble bees, including the rusty patched bumble bee." BA at 23. Indeed, the Federal Defendants admit there is only *one* known record of an overwintering rusty patched bumble bee." *Id.* at 24. Despite these admissions, the Federal Defendants arbitrarily conclude that the Bee does not currently overwinter on Bell Bowl Prairie and would not overwinter on Bell Bowl Prairie in the future.

Bell Bowl Prairie is a High Potential Zone: The BA frames Bell Bowl Prairie as not being within a High Potential Zone, but only a Low Potential Zone. This is an error. In fact, by the USFWS' stated methods, confirmation of the existence of the Bee on this site means that it is a High Potential Zone. In fact, USFWS's ArcGIS website identifies Bell Bowl Prairie as being within a High Potential Zone:



<https://www.arcgis.com/home/webmap/viewer.html?webmap=2716d871f88042a2a56b8001a1f1aca&extent=-100.6667,29.7389,-48.8551,50.9676>

Accordingly, the terms of the assessment must include recognition that it is analyzing impacts to the Bee in a High Potential Zone—the designation the USFWS chose to use when consultation is required. If the USFWS is unwilling to protect the Bee inside of High Potential Zones, and these are the most important places for the species, where will USFWS actually intervene to halt the Bee’s habitat loss?

Alternatives: The BA articulates numerous, viable alternatives to the “preferred alternative” that would preserve more of Bell Bowl Prairie. Moreover, Geosyntec (*see* Exhibit 4) has reviewed these alternatives and provided comment, although that information does not appear to be reflected in the BA or Letter of Concurrence. Yet USFWS is still authorizing large-scale habitat destruction, despite the existence of these viable alternatives.

Mowing: Mowing will promote herbaceous plants, but the Federal Defendants have provided no evidence that mowing will maintain this as quality habitat for the Bee. In fact, it may promote grasses over broad-leaved flowering plants on which the Bee depends.

Take: The construction that has taken place and the authorization of further construction on Bell Bowl Prairie directly harms the Bee and its habitat. This constitutes a take in violation of Section 9 of the ESA.

Conclusion

The Federal Defendants, IDOT, and GRAA have violated their conservation duties under Section 7 and Section 9 of the ESA. The BA and the Letter of Concurrence are legally flawed by failing to analyze and discuss information that would undercut their conclusions. As USFWS knows, the decline of the Bee is undisputable and actions to avoid and reduce stressors for the species are needed urgently. Yet, the Federal Defendants now ignore their conservation duties. 16 U.S.C. § 1536(a)(1). Here, the Federal Defendants, have a significant opportunity under their authority to

proactively contribute to the conservation of the Bee, which is “so imperiled that every remaining population is important for the continued existence of the species”³³ Having completed consultation without reliance on adequate facts, data, methods and research, the Federal Defendants’ authorization of additional construction by GRAA at Bell Bowl Prairie is unlawful and seeks to evade judicial review.

NLI would welcome an opportunity to discuss the Federal Defendants’ obligations under the ESA with its staff.

Very truly yours,

von BRIESEN & ROPER, s.c.

s/ Joseph M. Russell
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Attachments/Enclosures

³³ U.S. Fish & Wildlife Service, Survey Protocols for the Rusty Patched Bumble Bee (*Bombus affinis*), Version 1.2 (June 6, 2017) at 1 (“FWS Survey Protocols”).