ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Case No. 22-1164;
consolidated with Case Nos.
22-1210, 22-1164, 22-1225,
22-1227, 22-1228, 22-1229,
22-1230, and 22-1231

PETITIONER'S MOTION FOR SUMMARY VACATUR

MARGARET A. COULTER
Center for Biological Diversity
1411 K Street NW, Suite 1300
Washington, DC 20005
mcoulter@biologicaldiversity.org
(202) 961-4820

JASON C. RYLANDER
Center for Biological Diversity
1411 K Street NW, Suite 1300
Washington, DC 20005
jrylander@biologicaldiversity.org
(202) 744-2244

Counsel for Petitioner Center for Biological Diversity

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28 and Federal Rule of Appellate Procedure 28, counsel for Petitioner certifies the following:

(A) Parties, Intervenors, and Amici Curiae

The parties to this Petition are the Center for Biological Diversity as Petitioner, and the U.S. Environmental Protection Agency as Respondent. No motions to intervene have been filed at this time, but counsel is aware that some parties intend to do so. To the knowledge of undersigned counsel, at this time there are no *amici curiae* to this Petition.

(B) Action Under Review

Petitioner Center for Biological Diversity seeks review of the final action taken by Respondent the U.S. Environmental Protection Agency in promulgating a Final Rule issuing annual renewable fuel standards for 2020, 2021, and 2022, 87 Fed. Reg. 39,600 (July 1, 2022).

(C) Related Cases

This case has not previously been before this Court or any other court. To the knowledge of undersigned counsel, there are seven related cases to this Petition:

- *Sinclair Wyoming Refining Company LLC, et al. v. EPA*, Case No. 22-1210 (D.C. Cir.), docketed August 17, 2022;

- *Iogen Corporation, et al. v. EPA, et al.*, Case No. 22-1225 (D.C. Cir.), docketed August 29, 2022;
- *American Fuel & Petrochemical Manufacturers v. EPA*, Case No. 22-1227 (D.C. Cir.), docketed August 30, 2022;
- *American Refining Group, Inc., et al v. EPA*, Case No. 22-1228 (D.C. Cir.), docketed August 30, 2022;
- *The San Antonio Refinery LLC v. EPA*, Case No. 22-1229 (D.C. Cir.), docketed August 30, 2022;
- *Waste Management, Inc., et al v. EPA*, Case No. 22-1230 (D.C. Cir.), docketed August 30, 2022; and
- *Wynnewood Refining Company, LLC v. EPA*, Case No. 22-1231 (D.C. Cir.), docketed August 30, 2022.

The above cases were consolidated with the instant case pursuant to the Clerk's Orders of August 19 and 30, and September 1, 2022.

(D) Corporate Disclosure Statement

Pursuant to D.C. Circuit Rule 26.1, Petitioner the Center for Biological Diversity is a nonprofit corporation that possess no parent corporations and is not a publicly held corporation that possesses stock.

Respectfully submitted this 27th day of September 2022,

/s/ Margaret A. Coulter

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

GLOSSARY OF ABBREVIATIONS ix

EXHIBITS x

INTRODUCTION 1

STATEMENT OF JURISDICTION 2

FACTUAL AND PROCEDURAL BACKGROUND 3

STANDARD OF REVIEW 6

STANDING 6

ARGUMENT 10

I. EPA violated Section 7 of the Endangered Species Act 10

II. EPA's 7(d) Memo does not excuse the agency from completing consultation before issuing the Final Rule 14

A. EPA cannot rely on "preliminary assessments" to avoid consultation 16

B. EPA's authority to "reconsider" the Final Rule does not excuse its noncompliance with consultation requirements 18

III. The Court should vacate EPA's Final Rule. 20

A. The seriousness of EPA's violations weighs heavily in favor of vacatur 21

B. EPA cannot show that disruptive consequences would justify remand without vacatur 22

CONCLUSION 23

CERTIFICATE OF COMPLIANCE 25

CERTIFICATE OF SERVICE 25

TABLE OF AUTHORITIES

*Authorities upon which Petitioner chiefly relies are marked with asterisks.

Cases

All. for the Wild Rockies v. Forest Serv.,

907 F.3d 1105 (9th Cir. 2018) 23

Allied-Signal, Inc. v. Nuclear Regulatory Comm'n,

988 F.2d 146 (D.C. Cir. 1993) 21

Allina Health Servs. v. Sibelius,

746 F.3d 1102 (D.C. Cir. 2014) 20

Am. Fuel & Petrochemical Mfrs. v. EPA,*

937 F.3d 559 (D.C. Cir. 2019) 3, 4, 6, 7, 8, 9, 11, 22

Am. Pub. Gas Ass'n v. DOE,

22 F.4th 1018 (D.C. Cir. 2022) 22

Am. Waterways Operators v. Wheeler,

507 F. Supp. 3d 47 (D.D.C. 2020) 23

Bldg. Indus. Ass'n of Superior Cal. v. Babbitt,

161 F.3d 740 (D.C. Cir. 1998) 6

Cal. ex rel. Lockyer v. Dep't of Agric.,

575 F.3d 999 (9th Cir. 2009)..21

Cal. Wilderness Coal. v. DOE,

631 F.3d 1072 (9th Cir. 2011) 20

Ctr. for Biological Diversity v. EPA,*

861 F.3d 174 (D.C. Cir. 2017) 6, 9

Farmworker Ass'n of Fla. v. EPA,*

No. 21-1079, 2021 U.S. App. LEXIS 16882 (D.C. Cir. June 7, 2021) 2, 20, 21

Growth Energy v. EPA,*

5 F.4th 1 (D.C. Cir. 2021) 4, 6, 7, 10, 11, 12, 13, 18, 22

Hunt v. Wash. State Apple Advert. Comm'n,

432 U.S. 333 (1977) 7

Long Island Power Auth. v. FERC,

27 F.4th 705 (D.C. Cir. 2022) 21, 22

Lujan v. Defs. of Wildlife,

504 U.S. 555 (1992) 6

Lutheran Church-Mo. Synod v. FCC,

141 F.3d 344 (D.C. Cir. 1998) 22

Nat'l Parks Conservation Ass'n v. Jewell,

62 F. Supp. 3d 7 (D.D.C. 2014) 11, 17

Nat'l Wilderness Inst. v. Army Corps of Eng'rs,

No. 01-0273, 2005 U.S. Dist. LEXIS 5159 (D.D.C. Mar. 23, 2005) 15

North Carolina v. EPA,

550 F.3d 1176 (D.C. Cir. 2008) 23

Oceana v. Bureau of Ocean Energy Mgmt.,

37 F. Supp. 3d 147 (D.D.C. 2014) 10

Sills v. Bureau of Prisons,

761 F.2d 792 (D.C. Cir. 1985) 20

Tenn. Valley Auth. v. Hill,

437 U.S. 153 (1978) 10, 15

Whitman v. Am. Trucking Ass'ns,

531 U.S. 457 (2001) 16

Statutes

5 U.S.C. § 704 2

5 U.S.C. § 706 6

5 U.S.C. § 706(2) 3

16 U.S.C. § 1536(a)(2) 10, 14

16 U.S.C. § 1536(b)(3)(A) 10

16 U.S.C. § 1536(b)(4) 10, 20

16 U.S.C. § 1536(d) 14

28 U.S.C. §§ 2201–2202 3

42 U.S.C. § 7545(o)(2) 3

42 U.S.C. § 7545(o)(2)(B)(i)(I) 3

42 U.S.C. § 7545(o)(2)(B)(ii) 3

42 U.S.C. § 7545(o)(2)(B)(ii)(I) 14

42 U.S.C. § 7545(o)(7)....................3

42 U.S.C. § 7545(o)(7)(A) 18

42 U.S.C. § 7607(b)(1)....................2, 3

Regulations

50 C.F.R. § 402.02 12

50 C.F.R. § 402.09 14

50 C.F.R. § 402.14(a)....................11

Other

51 Fed. Reg. 19,926 (June 3, 1986) 11

86 Fed. Reg. 72,436 (Dec. 21, 2021) 4, 11

87 Fed. Reg. 39,600 (July 1, 2022).................... 1, 5, 11, 16, 22

EPA, *Biofuels and the Environment: Second Triennial Report to Congress* (2018) 4

U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., *Endangered Species Consultation Handbook* (Mar. 1998).................... 12, 15

GLOSSARY OF ABBREVIATIONS

CAA	Clean Air Act
EPA	U.S. Environmental Protection Agency
ESA	Endangered Species Act

EXHIBITS[1]

Exhibit A	Center for Biological Diversity's comments on the Environmental Protection Agency's Proposed Rule
Exhibit B	Environmental Protection Agency, June 1, 2022 Memorandum to the Docket: RFS 2020–2022 Annual Rule Endangered Species Act Obligations, EPA-HQ-OAR-2021-0324-0697 ("7(d) Memo")
Exhibit C	Declaration of Brett Hartl
Exhibit D	Declaration of Tierra Curry
Exhibit E	Declaration of Dr. Martin Hamel
Exhibit F	Declaration of William Matturo
Exhibit G	Declaration of Catherine Kilduff
Exhibit H	Declaration of John Buse
Exhibit I	Declaration of Will Harlan
Exhibit J	Declaration of Dr. James Williams
Exhibit K	Declaration of J.W. Glass

[1] Exhibits are compiled in Petitioner's Addendum to this motion.

Petitioner the Center for Biological Diversity ("Center") respectfully moves for summary vacatur of Respondent Environmental Protection Agency's ("EPA") final rule setting renewable fuel standards for 2020, 2021, and 2022, 87 Fed. Reg. 39,600 (July 1, 2022) ("Final Rule"), because of a serious, admitted violation of the Endangered Species Act ("ESA").[2]

INTRODUCTION

Despite this Court twice finding EPA violated the ESA by failing to consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service ("Services") on potential impacts of its annual renewable fuel standards to federally listed species and designated critical habitat, EPA has *again* failed to comply with ESA Section 7 consultation requirements.

Ethanol is the second largest use of corn in the United States (after animal feed), with over 5 billion bushels grown annually across tens of millions of acres of land. EPA's Renewable Fuel Standard Program has exacerbated land conversion to farmland, resulting in the loss of millions of acres of wildlife habitat. Growing biofuel feedstocks also requires billions of pounds of fertilizer and pesticides. Soil erosion, pesticide and fertilizer runoff, and habitat conversion degrade water

[2] Petitioner only raises its ESA claim in this motion and will address its CAA claim if further briefing is required. *See* Pet'r's Stmt. of Issues, ECF No. 1960294.

quality, damage natural ecosystems, and contribute to hypoxic dead-zones in the Gulf of Mexico and elsewhere.

By mandating increases in biofuel volumes—including a record minimum volume for transportation sector use of roughly 15 billion gallons of corn ethanol and 5.63 billion gallons of advanced biofuels in 2022—EPA's Final Rule worsens water pollution and habitat loss, harming threatened and endangered species including pallid sturgeon, whooping crane, sea turtles, and dozens of other species dependent on healthy river ecosystems and ever-shrinking native grasslands.

While EPA acknowledged its obligation to assess the impacts of its Final Rule on imperiled species and protected habitat, it has said only that it intends to consult at some point in the future, perhaps many years from now, and almost certainly *after* the Final Rule expires. This is not a one-off error but part of a track record of shirking mandatory duties under the ESA. Accordingly, summary vacatur is warranted. *Farmworker Ass'n of Fla. v. EPA*, No. 21-1079, 2021 U.S. App. LEXIS 16882, at *2 (D.C. Cir. June 7, 2021) (granting summary vacatur where EPA failed to complete an effects determination for pesticide).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this action under the Clean Air Act ("CAA"), which provides for direct review in the D.C. Circuit Court of Appeals. 42 U.S.C. § 7607(b)(1); *see also* 5 U.S.C. § 704 (judicial review of agency

actions). This Court has authority to issue declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201–2202 and 5 U.S.C. § 706(2).

Upon EPA's issuance of the Final Rule, Petitioners timely filed a petition for review within sixty days, 42 U.S.C. § 7607(b)(1). Pet. for Review, ECF No. 1956112, July 20, 2022.

FACTUAL AND PROCEDURAL BACKGROUND

The CAA's Renewable Fuel Standard Program requires EPA to ensure that a certain volume of renewable fuel is introduced into the nation's fuel supply each year to replace or reduce petroleum-based fuels. 42 U.S.C. § 7545(o)(2). The program initially required 4 billion gallons of renewable fuel in 2006, ascending to 36 billion gallons in 2022. *Id.* § 7545(o)(2)(B)(i)(I). However, EPA can approve waivers to reduce those volumes. *Id*. § 7545(o)(7). Starting in 2023, EPA can set annual volumes untethered to a mandatory schedule. *Id*. § 7545(o)(2)(B)(ii).

In 2019, this Court found EPA's 2018 standard violated the ESA because the agency wrongly asserted it had no discretion in setting the annual volumes. *Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 598 (D.C. Cir. 2019). The Court instructed EPA to make an "effects determination" assessing whether the rule would impact threatened and endangered species, triggering ESA consultation requirements. *Id.* Because petitioners in that case did not seek vacatur, the Court

remanded the 2018 rule. *Id.* EPA has not yet completed ESA consultation on the 2018 rule.

In 2021, this Court found EPA's 2019 standards also violated the ESA's consultation requirement. *Growth Energy v. EPA*, 5 F.4th 1, 7 (D.C. Cir. 2021). The Court rejected EPA's claim that the rule would have "no effect" on listed species or critical habitat in light of EPA's own Second Triennial Report to Congress[3] and unrebutted record evidence—including declarations by scientists which "connect[ed] the renewable fuel standards program, increased corn and soybean production, and harm to threatened species." *Id.* at 32. Petitioners did not seek vacatur, and EPA has not completed ESA consultation on remand.

On December 21, 2021, EPA issued the proposed rule for the 2020–2022 renewable fuel standards, noting it "intends to initiate consultation, as appropriate, with the Services," and that "[a]t this time, EPA is evaluating whether any federally listed threatened or endangered species or their critical habitat are likely to be adversely affected by the finalization of this rulemaking." 86 Fed. Reg. 72,436, 72,442 (Dec. 21, 2021) ("Proposed Rule").

The Center submitted comments on the Proposed Rule on February 4, 2022. Pet'r's Comments ("Exhibit A"). Analyzing watersheds most affected by corn and

[3] EPA, *Biofuels and the Environment: Second Triennial Report to Congress* at ix–xiii (2018), https://cfpub.epa.gov/si/si_public_record_report.cfm?Lab=IO&dirEntryId=341491.

soy production, the Center identified at least 65 threatened and endangered species, including pallid sturgeon, whooping crane, and Ozark hellbender, that would likely be adversely affected by EPA's proposal. *Id.* at 6–8. The Center highlighted that EPA's annual standards influence the "amount of crops grown for biofuels, which in turn results in significant impacts on the environment through land-use conversion and downstream pollution impacts from fertilizers, pesticides, and soil runoff" leading to "landscape-level negative consequences for endangered species." *Id.* at 4–5.

On July 1, 2022, EPA published the Final Rule. 87 Fed. Reg. 39,600 (July 1, 2022). EPA stated it "has been engaged in informal consultation including technical assistance discussions with the Services regarding this rule for over a year" and had "prepared an ESA section 7(d) determination memorandum that discusses our decision to finalize this action before the consultation process is complete." *Id.* at 39,605–06.[4] Responding to public comments, EPA stated it had "determined that it is appropriate to conduct ESA consultation regarding this rule." EPA, Response to Comments (July 1, 2022), EPA-420-R-22-009,[5] at 212.

---

[4] *See* EPA, "Memorandum to the Docket: RFS 2020–2022 Annual Rule Endangered Species Act Obligations" (June 1, 2022), EPA-HQ-OAR-2021-0324-0697 ("7(d) Memo") ("Exhibit B").

[5] *Available at* https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P101562X.pdf.

Nowhere in the Final Rule, response to comments, or 7(d) Memo does EPA state when formal consultation might begin, let alone conclude.

STANDARD OF REVIEW

This Court reviews questions of law *de novo*. *Bldg. Indus. Ass'n of Superior Cal. v. Babbitt*, 161 F.3d 740, 743 (D.C. Cir. 1998). It reviews agency decisions made pursuant to the ESA and CAA under the "arbitrary and capricious" standard, 5 U.S.C. § 706. *Growth Energy*, 5 F.4th at 17; *Am. Fuel*, 937 F.3d at 574.

STANDING

The Center has standing to challenge EPA's Final Rule setting renewable fuel standards for 2020–2022. To have standing, petitioners must suffer a concrete and particularized injury that was caused by the challenged conduct and is likely redressable by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Where petitioners allege procedural injury, the redressability requirement is relaxed. *Id.* at 572 n.7. Finally, an association has standing "if (1) at least one of its members would have standing to sue in his own right; (2) the interest it seeks to protect is germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the member to participate in the lawsuit." *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 182 (D.C. Cir. 2017) (citation omitted).

In *American Fuel*, this Court found environmental petitioners had standing to challenge the 2018 standards due to "an obvious interest in challenging the EPA's failure to engage in consultation.'" 937 F.3d at 592. In *Growth Energy*, this Court again found petitioners had standing to challenge EPA's 2019 standards "[f]or substantially the [same] reasons." 5 F.4th at 28. The Final Rule at issue is the "next iteration" of the 2018 and 2019 standards, setting renewable fuel volumes for 2020, 2021 and 2022. *Id.* at 32. There is "little daylight between [*Growth Energy*] and [*American Fuel*]" and this case, *id.* at 30, and thus the Court should likewise find the Center has standing.

Petitioner's members' interests are harmed by EPA's failure to complete consultation. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342–43 (1977). Those interests are germane to the Center's organizational mission and dedication to protecting and enjoying biodiversity, Hartl Decl. ¶¶ 4–5, 13–14 ("Exhibit C"); Curry Decl. ¶¶ 6–7, 18–19 ("Exhibit D"), and this litigation does not require the participation of individual members, *Hunt*, 432 U.S. at 343. Moreover, the Center's members would have standing to sue in their own right based on procedural injury to their interests, *id.*, as explained below.

The Center's claim that EPA failed to meet its obligations under the ESA "describes an 'archetypal procedural injury.'" *Am. Fuel*, 937 F.3d at 592 (citation omitted). For example, Center member Dr. Martin Hamel is a fish biologist and

associate professor at the University of Georgia who has spent much of his professional life studying and writing about imperiled sturgeon, including the endangered pallid sturgeon, Hamel Decl. ¶¶ 3–5, 7-9 (“Exhibit E”). He is injured by EPA’s failure to consult on the Final Rule as water pollution and sedimentation have and will continue to increase in sturgeon habitat as growers meet the increased demand for biofuels set by EPA. *Id.* ¶ 10. This poses a significant threat to pallid sturgeon. *Id.* ¶ 11–12. Any loss of even an individual sturgeon would hamper Dr. Hamel’s ability to research this species, thereby harming his academic and aesthetic interests in pallid sturgeon. *Id.* ¶ 13. His ability to study and enjoy pallid sturgeon and its habitat depends entirely on the continued existence of the species and protection and preservation of its critical habitat. *Id. See also generally* Hartl Decl. (injured by impacts to whooping crane); Curry Decl. (relict darter, snuffbox mussel); Matturo Decl. (“Exhibit F”) (various listed sea turtles); Kilduff Decl. (“Exhibit G”) (Atlantic sturgeon, loggerhead sea turtle); Buse Decl. (“Exhibit H”) (Hine’s emerald dragonfly); Harlan Decl. (“Exhibit I”) (Ozark hellbender); Williams Decl. (“Exhibit J”) (various listed freshwater fish and mussels).

The attached declarations from Center members adequately demonstrate injury to concrete “aesthetic and recreational interests in observing” listed species. *Am. Fuel*, 937 F.3d at 592–93. As in *American Fuel*, EPA’s failure to consult “‘demonstrably increased some specific risk of environmental harm[s]’ that

'imperil' the members' 'particularized interests' in a species or habitat with which the members share a 'geographic nexus.'" *Id.* (citations omitted). *See, e.g.*, Hartl Decl. ¶ 7–12; Kilduff Decl. ¶¶ 5–12, 18; Williams Decl. ¶¶ 11, 14–16; Hamel Decl. ¶ 13.

Regarding causation, petitioners need only "show that the procedural step was connected to the substantive result." *Ctr. for Biological Diversity*, 861 F.3d at 184–85. In *American Fuel*, this Court found petitioners were harmed by EPA's failure to comply with consultation requirements since "EPA's own [Second] Triennial Report concluded that the [Renewable Fuel Standard] Program's annual standards likely cause the conversion of uncultivated land into agricultural land for growing [biofuel feedstock] crops." 937 F.3d at 593. Similarly, here, EPA's failure to complete consultation on the Final Rule is directly connected to the Center's and its members' injuries.

For procedural injuries, the requirement of redressability is "relaxed" and petitioner "need not show" EPA "would alter" its Final Rule if ordered to comply with its ESA obligations, but rather that "EPA could reach a different conclusion." *Ctr. for Biological Diversity*, 861 F.3d at 185 (citations omitted). Petitioner's and its members' injuries would be redressed by an order requiring EPA to comply with the ESA. Data and analysis developed through consultation could lead EPA to conclude that harm to protected species and habitat warrants waiver of the volume

requirements per 42 U.S.C. § 7545(o)(7)(A), thereby averting further land conversion, pesticide runoff, and water pollution. Also, conservation measures developed through consultation could mitigate such harms. 16 U.S.C. §§ 1536(b)(3)(A), (b)(4); *see also Growth Energy*, 5 F.4th at 29 (noting the "[2019] standards might have come out differently if the EPA had complied" with the ESA).

For these reasons, the Center has standing to challenge the Final Rule.

ARGUMENT

I. EPA violated Section 7 of the Endangered Species Act.

In enacting the ESA, Congress made the deliberate decision "to give endangered species priority over the 'primary missions' of federal agencies" to "halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184–185 (1978). To meet this mandate, Section 7(a)(2) "imposes two obligations upon federal agencies": a procedural requirement "that agencies consult with the [Services] to determine the effects of their actions on endangered or threatened species and their critical habitat," and a substantive duty to "insure that their actions not jeopardize endangered or threatened species or their critical habitat." *Oceana v. Bureau of Ocean Energy Mgmt.*, 37 F. Supp. 3d 147, 174–75 (D.D.C. 2014); 16 U.S.C. § 1536(a)(2).

ESA regulations further require that "[e]ach Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If [so], formal consultation is required." 50 C.F.R. § 402.14(a). In making its "effects determination" the agency must assess whether a proposed action "may affect" listed species or critical habitat. *Id*. The term "may affect" is broadly construed to include "[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character," and is easily triggered. 51 Fed. Reg. 19,926, 19,949 (June 3, 1986); *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F. Supp. 3d 7, 12-13 (D.D.C. 2014) ("The 'may affect' threshold for triggering the consultation duty … is low.").

Although this Court *twice* ruled that consultation was required on earlier iterations of EPA's standards, *see Am. Fuel*, 937 F.3d at 568; *Growth Energy*, 5 F.4th at 7, EPA did not initiate consultation on its 2020–22 standards before issuing its proposed rule. 86 Fed. Reg. at 72,442. In its Final Rule, EPA stated it "has been engaged in informal consultation including technical assistance discussions with the Services regarding this rule for over a year" but nevertheless "deci[ded] to finalize this action before the consultation process is complete." 87 Fed. Reg. at 39,605–06.

This engagement is less significant than it appears. *Any* correspondence between EPA and the Services qualifies as informal consultation; furthermore, the

purpose of "technical assistance" is for the Services to help the action agency define the action area and develop a list of potentially affected species. U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., *Endangered Species Consultation Handbook* ("Consultation Handbook") at 3-1, 3-7 (Mar. 1998).[6] These are merely preliminary steps necessary to make an effects determination.

Moreover, responses to the Center's Freedom of Information Act requests reveal minimal communication between EPA and the expert wildlife agencies. Glass Decl. ¶¶ 26–35 ("Exhibit K"). For example, despite receiving lists of potentially impacted species from the Services in the fall of 2021, Glass Decl. ¶¶ 8–9, 13–18, 22–30, there is no evidence in the docket or records received by the Center that EPA ever defined the "action area"—"all areas to be affected directly or indirectly by the Federal action," 50 C.F.R. § 402.02—for the Final Rule, the first step in making an effects determination. Glass Decl. ¶ 17.

EPA's failure to proceed directly to formal consultation is particularly egregious because this Court has already held that EPA's issuance of annual renewable fuel standards may affect protected species and habitat. *Growth Energy*, 5 F.4th at 31–32. The Final Rule does not substantively grapple with—much less rebut—the Court's findings in *Growth Energy* that EPA's own Second Triennial

---

[6] *Available at* https://www.fws.gov/sites/default/files/documents/endangered-species-consultation-handbook.pdf.

Report to Congress demonstrated a relationship between "the renewable fuel standards program, biofuel feedstock production, and land use changes that may harm listed species or critical habitat," nor that unrebutted declarations by scientists "connect[ed] the renewable fuel standards program, increased corn and soybean production, and harm to threatened species." *Id.* at 31, 32.

Furthermore, EPA has acknowledged its action may affect listed species and habitat, necessitating that the agency complete formal consultation. In its Regulatory Impact Analysis for the Final Rule, EPA admits "[i]t is likely that the environmental and natural resource impacts associated with [documented] land use change are, at least in part, due to increased biofuel production and use." EPA, *Renewable Fuel Standard (RFS) Program: RFS Annual Rules Regulatory Impact Analysis* (June 2022), EPA-HQ-OAR-2021-0324-0766 ("Regulatory Impact Analysis") at 95.[7] It particularly notes that "impacts of renewable fuel on the conversion of wetlands, ecosystems, and wildlife habitats" "are associated with crop-based feedstocks." *Id.* at 95–96; *see also e.g.*, *id.* at 95, 96, 99, 100, 104 (noting other environmental impacts).

EPA should be well beyond the stage of informal consultation and cannot justify its failure to complete formal consultation before issuing the Final Rule.

---

[7] *Available at* https://www.regulations.gov/document/EPA-HQ-OAR-2021-0324-0766.

The mere lip service paid to the agency's ESA obligations in the Final Rule does not satisfy EPA's procedural duty to complete consultation with the Services prior to acting, and thus also violates EPA's substantive obligation to insure against jeopardizing listed species. 16 U.S.C. § 1536(a)(2).

II. EPA's 7(d) Memo does not excuse the agency from completing consultation before issuing the Final Rule.

Rather than simply complying with Section 7(a) and this Court's prior rulings, EPA issued a memo under Section 7(d) explaining its decision to issue the Final Rule without completing consultation. EPA claimed it need not complete consultation before setting the annual standards because its "preliminary assessments"[8] found no "impacts of concern" on listed species during the consultation period, and the agency retains some authority under the CAA to retroactively "reconsider" the Final Rule. 7(d) Memo at 3. Both legally and factually, EPA's contentions are wrong.

ESA Section 7(d) provides that "after initiation of consultation … the Federal agency … shall not make any irreversible or irretrievable commitment of resources … which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures." 16 U.S.C. § 1536(d). This

[8] EPA undertook these "preliminary assessments" pursuant to CAA requirements to consider impacts of production and use of renewable fuels on the environment in setting annual renewable fuel standards. 42 U.S.C. § 7545(o)(2)(B)(ii)(I).

prohibition is in force "during the consultation process and continues until the requirements of section 7(a)(2) are satisfied." 50 C.F.R. § 402.09. "The purpose of this restriction is to ensure that the status quo is maintained throughout the consultation process." *Nat'l Wilderness Inst. v. Army Corps of Eng'rs*, No. 01-0273, 2005 U.S. Dist. LEXIS 5159, *51–52 (D.D.C. Mar. 23, 2005).

Congress added Section 7(d) to the ESA in the aftermath of *TVA v. Hill* to ensure that projects like the Tellico dam would not continue construction during consultation, thereby creating a bureaucratic steamroller that would bias or undermine the consultation process. 437 U.S. at 174. Thus, while Section 7(a) prohibits any agency action that "may affect" species before consultation is completed, Section 7(d) *additionally* prohibits any "irreversible or irretrievable commitment of resources" that forecloses alternatives that could be considered in the consultation process. *See, cf.*, Consultation Handbook at 2-7.

While Congress intended Section 7(d) to be an additional safeguard for listed species, EPA wrongly invokes it to justify proceeding with its Final Rule before consultation has concluded (or even formally commenced). Section 7(d) applies "after" initiation of interagency consultations, Consultation Handbook at 2-7, 2-8, so an agency has no basis to make a 7(d) finding before formal consultation even begins. But more fundamentally, Section 7(d) does not permit an agency to avoid consulting before taking a final action. To comply with Section 7(d), an

agency must simply ensure no actions occur *during* the consultation process that alter the status quo to the detriment of species. The consultation must still be completed before the agency takes its final action.

EPA's novel interpretation would allow an agency to postpone or avoid consultation entirely simply by writing a memo declaring, with minimal analysis, that there will be "no impacts of concern" to species during consultation, with no guarantee of when—if ever—it will complete the consultation. *See generally* 7(d) Memo. Indeed, EPA still has not consulted on the 2018 and 2019 standards. 87 Fed. Reg. at 39,606 n.24. EPA cannot alter the ESA's fundamental regulatory scheme by invoking a newly discovered unilateral and ancillary power which undermines the ESA's primary purpose. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress … does not … hide elephants in mouseholes.").

A. EPA cannot rely on "preliminary assessments" to avoid consultation.

EPA's conclusions in the 7(d) Memo further illustrate the agency's failure to address the real-world impacts of its action on threatened and endangered species. EPA claims it is "continuing to carry out" "preliminary assessments" required by the CAA, and that these assessments "to date, do not indicate impacts of concern on listed species or their critical habitats during the interim period while consultation is being completed." 7(d) Memo at 3–4. There are at least two problems with this analysis.

First, the consultation duty is triggered by the low "may affect" threshold, *Nat'l Parks Conservation Ass'n*, 62 F. Supp. 3d at 12–13—not "impacts of concern"—and EPA has already acknowledged its duty to consult, Response to Comments at 212. As demonstrated above, Section 7(d) does not permit EPA to simply defer consultation to some future date. Given EPA's track record with consultation on past standards, there is also no way to tell—and EPA does not volunteer—how long its "interim" consultation period could last.

Second, EPA's assessments, to the extent they consider wildlife at all,[9] make clear that the Final Rule could have significant impacts. EPA concedes increases in renewable fuel volumes have "potential to affect listed species or habitat" and that "additional analysis is warranted and appropriate." 7(d) Memo at 4. But EPA's review is indeed "preliminary" and far from adequate; the words "endangered species" or "listed species" do not appear in the Regulatory Impact Analysis summarizing its "preliminary assessments." And, but for comments provided by the Center and others, there is nothing in the docket suggesting EPA ever considered impacts to specific threatened or endangered species at all, such as whooping crane or pallid sturgeon, which this Court has noted could be harmed by

[9] EPA's Regulatory Impact Analysis explains that "[w]hile the impacts of land use and management on wildlife have been studied … the impacts of the RFS program specifically have not" thus, the agency "cannot confidently estimate the impacts to date on wildlife from biofuels generally nor from the annual volume requirements, specifically." Regulatory Impact Analysis at 105, 107.

the renewable fuel standards. *Growth Energy*, 5 F.4th at 30. However, the Regulatory Impact Analysis does repeatedly acknowledge that "[t]he 2022 volume requirements could have some impact largely due to their potential ability to incent greater production of biofuels and their underling crop-based feedstocks." Regulatory Impact Analysis at 99; *see also id.* at 104, 107, 122, 136, 223, 239.

Thus, EPA's "preliminary assessments" do not adequately evaluate the Final Rule's impacts on listed species, and in fact demonstrate that the renewable fuel standards may affect wildlife, *id.* at 104–07. Even taken in their best light, these assessments do not absolve EPA of its formal ESA consultation duty.

B. EPA's authority to "reconsider" the Final Rule does not excuse its noncompliance with consultation requirements.

EPA asserts it could "reconsider" the Final Rule retroactively to "address any consultation outcomes" and argues this insulates it from making an illegal "irreversible or irretrievable commitment of resources" under Section 7(d). 7(d) Memo at 3, 6–7. Even if this were true, no possibility of retroactive action can excuse the agency from completing Section 7 consultation before issuing the Final Rule.

While EPA can waive renewable fuel requirements "in whole or in part" under certain circumstances, 42 U.S.C. § 7545(o)(7)(A), the mere assertion that this authority exists does not mean it will be invoked or can rectify the agency's

failure to consult in the first instance. EPA admits retroactive adjustments cannot influence past biofuel use or production, so EPA "cannot cause any changes in the use or production of biofuels in those years." 7(d) Memo at 4. But EPA cannot simultaneously argue it can modify its 2022 volumes in the future but *cannot* revise past actions concerning the 2020 and 2021 volumes. Moreover, any changes required post consultation would likely need notice and comment rulemaking, and necessarily could only apply after impacts have occurred. Thus, EPA can only really address species impacts in future rulemakings.

EPA also argues that since the RFS program operates by trading credits for renewable fuel volume obligations, after-the-fact changes to the Final Rule required under a belated ESA consultation would merely result in the shifting of credits to future years. 7(d) Memo at 7. But EPA cannot explain how this would address impacts that have already occurred. At best, it would inform the new standards, which themselves should be finalized only after proper consultation. EPA also assumes a future need for renewable fuels that allows for credit trading in future years, but congressionally mandated volumes end in 2022 and EPA must still determine volumes in 2023 and beyond.

As a practical matter, EPA cannot ameliorate on-the-ground impacts to protected species and habitat through retroactive corrective measures. Timely prior

consultation is necessary to avoid or minimize harms before they occur. 16 U.S.C. § 1536(b)(4).

III. The Court should vacate EPA's Final Rule.

EPA concedes it has not completed ESA consultation on its Final Rule, and it has still not consulted on the 2018 and 2019 standards despite court orders to do so. Summary vacatur is the appropriate remedy given EPA's clear violation of law and the practical reality that it is unlikely to remedy this violation before the Final Rule expires. *Farmworker Ass'n of Fla.,* 2021 U.S. App. LEXIS 16882, at *2 (granting summary vacatur where EPA failed to complete an effects determination and had no immediate plans to do so). Further, EPA's violation is so clear that additional briefing or argument would not affect the Court's decision. *Sills v. Bureau of Prisons*, 761 F.2d 792, 793–94 (D.C. Cir. 1985).

Vacatur is the "normal remedy" where a federal agency has acted contrary to law. *Allina Health Servs. v. Sibelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014); *Cal. Wilderness Coal. v. DOE*, 631 F.3d 1072, 1095 (9th Cir. 2011) ("When a court determines that an agency's action failed to follow Congress's clear mandate the appropriate remedy is to vacate that action."). To determine whether departure from vacatur is appropriate, courts weigh the seriousness of the agency's errors against "the disruptive consequences of an interim change that may itself be

changed." *Allied-Signal, Inc. v. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). Neither factor favors EPA.

A. The seriousness of EPA's violations weighs heavily in favor of vacatur.

Failure to comply with the ESA's consultation mandate is a serious error of law with real-world environmental consequences that weighs heavily in favor of vacatur. *See Cal. ex rel. Lockyer v. Dep't of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009) (describing Section 7(a)(2) as "the heart" of the ESA); *Farmworker Ass'n of Fla.*, 2021 U.S. App. LEXIS 16882, at *2 (vacating EPA's action "in light of the seriousness of" EPA's failure to consult on expanded pesticide registration).

EPA knows the Final Rule could have landscape-level negative consequences for endangered and threatened species and their critical habitats, yet it chose to act in defiance of the law. EPA's failure to consult on this latest iteration of the renewable fuel standards is not only a serious violation of its statutory duties under the ESA, but part of a grave pattern of continued evasion of those statutory duties that it cannot justify on remand. *Long Island Power Auth. v. FERC*, 27 F.4th 705, 717 (D.C. Cir. 2022) ("The seriousness of agency error turns in large part on how likely it is the agency will be able to justify its decision on remand.") (cleaned up).

This Court has also cautioned that "[a]n open-ended remand without vacatur … can create a new problem: The agency may have little or no incentive to fix the deficient rule." *Am. Pub. Gas Ass'n v. DOE*, 22 F.4th 1018, 1030 (D.C. Cir. 2022). EPA's record of ESA compliance for this and previous renewable fuel standards suggests that is now the case. *See, e.g.*, *Am. Fuel*, 937 F.3d at 598; *Growth Energy*, 5 F.4th at 34; 87 Fed. Reg. at 39,606 n.24. Any attempt by EPA to seek remand without vacatur should be rejected because it would support EPA's continuing pattern of avoiding judicial review. *See Lutheran Church-Mo. Synod v. FCC*, 141 F.3d 344, 349 (D.C. Cir. 1998) (denying agency's remand motion intended to avoid judicial review). Given this context, the seriousness of EPA's violations weighs overwhelmingly in favor of vacatur.

B. EPA cannot show that disruptive consequences would justify remand without vacatur.

This Court has held that "disruptive consequences matter 'only insofar as the agency may be able to rehabilitate its rationale.'" *Long Island Power Auth.*, 27 F.4th at 717 (citation omitted). EPA has no credible argument that consultation on the Final Rule is unnecessary, so this factor weighs against the agency. Regardless, vacatur pending consultation would not cause significant disruptive consequences, as illustrated by EPA's own 7(d) Memo. As EPA explained, the practical effect of vacating the Final Rule is that the number of renewable fuel volume obligations

credits available this year would decrease, which would merely "increase the balance of credits available to obligated parties for carrying over into future compliance years." 7(d) Memo at 7. Further, the Final Rule will only be in effect until the summer of 2023, when EPA will finalize the next annual rule. Thus, while vacatur would result in obligated parties no longer being able to use credits this year, those credits can be carried forward for use in the next year's rule, with minimal disruptive consequences to obligated parties.

In environmental cases, the Court must also consider the most environmentally beneficial relief. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008); *All. for the Wild Rockies v. Forest Serv.*, 907 F.3d 1105, 1122 (9th Cir. 2018) (vacatur "appropriate when leaving in place an agency action risks more environmental harm than vacating it"). EPA admits that increased biofuels production spurred by the Final Rule will likely adversely affect protected wildlife. *See, e.g.*, Regulatory Impact Analysis at 95, 96, 99, 100, 104, 107. Allowing the Final Rule to remain in place risks continued harm to protected species and habitat. *Am. Waterways Operators v. Wheeler*, 507 F. Supp. 3d 47, 77 (D.D.C. 2020) ("costs do not outweigh the potential environmental harm").

CONCLUSION

For all these reasons, this Court should summarily vacate EPA's Final Rule.

Dated: September 27, 2022

Respectfully submitted,

/s/ Margaret A. Coulter
Margaret A. Coulter (DC Bar No. 1034249)
mcoulter@biologicaldiversity.org
(202) 961-4820

Jason C. Rylander (DC Bar No. 474995)
jrylander@biologicaldiversity.org
(202) 744-2244

CENTER FOR BIOLOGICAL
DIVERSITY
1411 K Street NW, Suite 1300
Washington, DC 20005

Attorneys for Petitioner Center for Biological Diversity

CERTIFICATE OF COMPLIANCE

I certify the foregoing brief complies with the format and page limit specified by Circuit Rule 27(a)(2) and Federal Rule of Appellate Procedure 27(d)(2)(a) because it contains 5,198 words according to the word count function of Microsoft Word. I certify that the foregoing complies with the type face and type style requirements of Circuit Rule 27(a)(2) and Federal Rule of Appellate Procedure 27(d)(1) because it is drafted in 14-point Times New Roman font.

/s/ Margaret A. Coulter

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing Motion for Summary Vacatur and Exhibits with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on September 27, 2022. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Margaret A. Coulter