NOT YET SCHEDULED FOR ORAL ARGUMENT
Case Number 19-1023 and consolidated cases

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL WILDLIFE FEDERATION, HEALTHY GULF, AND SIERRA CLUB, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and ANDREW R. WHEELER, Administrator, United States Environmental Protection Agency Respondent.	No. 19-1039 (consolidated with 19-1023, 19-1027, 19-1032, 19-1033, 19-1035, 19-1036, 19-1037, 19-1038) Environmental Petitioners' Opening Brief

ENVIRONMENTAL PETITIONERS' [INITIAL] OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 15(c)(3) and 28(a)(1), Petitioners National Wildlife Federation, Healthy Gulf, and Sierra Club ("Environmental Petitioners") respectfully submit this Certificate as to Parties, Rulings, and Related Cases.

(A) Parties and Amici

19-1039: The Petitioners in Case No. 19-1039 are National Wildlife Federation, Healthy Gulf, and Sierra Club, and the Respondents are United States Environmental Protection Agency ("EPA") and Andrew Wheeler. American Fuel & Petrochemical Manufacturers and Monroe Energy, LLC, moved to intervene on behalf of Respondents in all cases consolidated with the lead case, 19-1023. *See* Doc. Nos. 1775620, 1776296. In addition, American Petroleum Institute moved to intervene in all cases. *See* Doc. No. 1777451. There are no amici at this time.

The parties in the other consolidated cases are:

19-1023: The Petitioner is Growth Energy, and the Respondents are EPA and Andrew Wheeler. There are no amici at this time.

19-1027: The Petitioner is RFS Power Coalition, and the Respondents are EPA and Andrew Wheeler. There are no amici at this time.

19-1032: The Petitioner is Monroe Energy, LLC, and the Respondents are EPA and Andrew Wheeler. There are no amici at this time.

19-1033: The Petitioner is Small Retailers Association, and the Respondents are EPA and Andrew Wheeler. There are no amici at this time.

19-1035: The Petitioner is National Biodiesel Board, and the Respondent is EPA. There are no amici at this time.

19-1036: The Petitioner is Producers of Renewables United for Integrity Truth and Transparency, and the Respondent is EPA. There are no amici at this time.

19-1037: The Petitioner is American Fuel & Petrochemical Manufacturers, and the Respondent is EPA. There are no amici at this time.

19-1038: The Petitioner is Valero Corporation, and the Respondent is EPA. There are no amici at this time.

(B) Rulings Under Review

The final agency action under review in this case is EPA's Final Rule entitled, "Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020," 83 Fed. Reg. 63,704 (Dec. 11, 2018) (to be codified at 40 C.F.R. pt. 80). The Final Rule was published in the Federal Register on December 11, 2018. *See id.*

(C) Related Cases

The nine consolidated cases in this action (listed above) are all related, as they all challenge and require review of the same final agency action. However,

none of the other consolidated cases raise the same issues as Environmental Petitioners. None of the consolidated cases have been reviewed by this or any other court.

Several of the issues raised in the consolidated cases are related to those raised in *Am. Fuel & Petrochemical Mfrs. v. EPA*, No. 17-1258, 2019 WL 4229073 (D.C. Cir. Sept. 6, 2019) and consolidated cases, which were decided by this Court on September 6, 2019.

Respectfully submitted,

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. Civ. P. 26.1 and D.C. Cir. R. 26.1, Petitioners National Wildlife Federation, Healthy Gulf, and Sierra Club ("Environmental Petitioners") respectfully submit their Corporate Disclosure Statements as follows:

1. National Wildlife Federation has no parent companies, and there are no companies that have a 10 percent or greater ownership interest in the corporation. National Wildlife Federation is a national non-profit corporation organized under the laws of the District of Columbia, and its mission is to unite all Americans to ensure wildlife thrive in a rapidly changing world.
2. Healthy Gulf has no parent companies, and there are no companies that have a 10 percent or greater ownership interest in the corporation. Healthy Gulf is a non-profit corporation organized under the laws of the State of Louisiana committed to uniting and empowering people to protect and restore the resources of the Gulf Region, forever protecting it for future generations.
3. Sierra Club has no parent companies, and there are no companies that have a 10 percent or greater ownership interest in the corporation. Sierra Club is a national non-profit corporation organized under the laws of the State of California dedicated to the protection and enjoyment of the environment.

Respectfully submitted,

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GLOSSARY OF ABBREVATIONS

Pursuant to DC Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

APA	Administrative Procedure Act
CAA	Clean Air Act
CO2	Carbon dioxide
Comments	Comments from ActionAid USA, Clean Air Task Force, Earthjustice, Mighty Earth, National Wildlife Federation, and Sierra Club on Club on the U.S. Environmental Protection Agency's Proposed Rule - "Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020" 83 Federal Register 32024 (July 10, 2018); EPA–HQ–OAR–2018–0167
EISA	Energy Independence and Security Act
Environmental Petitioners	Petitioners National Wildlife Federation, Healthy Gulf, and Sierra Club
EPA	Environmental Protection Agency
EPA No Effect Determination Memorandum	EPA Staff, Memorandum re Endangered Species Act No Effect Finding and Determination on Severe Environmental Harm under the General Waiver Authority for the 2019 Final Rule
ESA	Endangered Species Act
Final Rule or 2019 Rule	Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volumes for 2020, 83 Fed. Reg. 63,704 (Dec. 11, 2018) (to be codified at 40 C.F.R. pt. 80)
GHG	Greenhouse Gas

JA	Joint Appendix
Lark	Declaration of Dr. Tyler Lark
N2O	Nitrous Oxide
RFS	Renewable Fuel Standard
Services	U.S. Fish and Wildlife Service and National Marine Fisheries Service
TR	EPA Office of Research and Development, *Biofuels and the Environment: Second Triennial Report to Congress*, June 29, 2018

INTRODUCTION

Pristine grassland converted to grow crops. Native habitat lost to cultivation. Endangered and threatened species' continued existence jeopardized. Water polluted by nutrient runoff. Tremendous volumes of greenhouse gases released into the atmosphere. These are some of the documented harms resulting from the production of renewable biomass, including corn for ethanol and soy for biodiesel. Yet, when promulgating the Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volumes for 2020, 83 Fed. Reg. 63,704 (Dec. 11, 2018) (to be codified at 40 C.F.R. pt. 80) ("Final Rule" or "2019 Rule"), the Environmental Protection Agency ("EPA") ignored a mountain of evidence – including from EPA itself – demonstrating the severe and extensive harm to threatened and endangered species, their habitats, the environment, and climate resulting from renewable fuel production. Discarding the facts, EPA determined that it need not consult with the U.S. Fish and Wildlife Services or the National Marine Fisheries Service (collectively, "Services"), included a policy that unlawfully allows the conversion of millions of acres of uncultivated land to grow renewable biomass, and failed to issue a waiver to lower volume requirements based on severe environmental harm. In doing so, EPA violated the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–1544, the Administrative Procedure Act

("APA"), 5 U.S.C. § 706, and the Clean Air Act ("CAA"), 42 U.S.C. § 7545(o). Thus, the 2019 Rule cannot stand.

STATEMENT OF JURISDICTION

This Court has exclusive jurisdiction over this case because National Wildlife Federation, Healthy Gulf, and Sierra Club ("Environmental Petitioners") challenge the 2019 Rule, which is a "nationally applicable regulation" promulgated by EPA under the CAA. 42 U.S.C. § 7607(b)(1); *see also Am. Fuel & Petrochemical Mfrs. v. EPA*, No. 17-1258, 2019 WL 4229073, at *20 (D.C. Cir. Sept. 6, 2019) ("*Am. Fuel*") (finding an analogous challenge to the 2018 final rule setting fuel volumes for 2019 "squarely within [the Court's] jurisdiction under the Clean Air Act"). In accordance with 42 U.S.C. § 7607(b)(1) and 16 U.S.C. §1540(g)(2)(A)(i), the petition for review was timely filed on February 11, 2019, 60 days after Environmental Petitioners filed their Notice of Intent to Sue Letter, Doc. No. 1773280 at 50-72, JA___-__, and within 60 days of EPA's publication of the Final Rule in the Federal Register. *See* 83 Fed. Reg. 63,704 (Dec. 11, 2018).

STATEMENT OF ISSUES

Environmental Petitioners raise four issues:

1. Whether EPA violated Section 7 of the ESA, 16 U.S.C. § 1536(a)(2), by promulgating the Final Rule without first consulting with the Services to insure that this action would not jeopardize any federally listed endangered or threatened species or destroy or adversely modify their designated critical habitat.

2. Whether EPA violated the APA, 5 U.S.C. § 706, when promulgating the Final Rule by relying on an arbitrary and capricious ESA "No Effect" determination to conclude it need not consult the Services, ignoring evidence – including from EPA's own reports – indicating that the action is likely to jeopardize the continued existence of threatened or endangered species or result in the degradation of critical habitat.

3. Whether EPA violated the CAA, 42 U.S.C. § 7545(o), when promulgating the Final Rule by including an approach to land use that permits land that was not in cultivation prior to 2007 to be converted to cropland to produce renewable biomass, in direct contravention of the statutory text and climate and environmental purposes of the statute, *see id.* § 7545(o)(1)(I); *see also* 153 Cong. Rec. H14,451-02 (Dec. 6, 2007), 2007 WL 4270020; 153 Cong. Rec. H14,434-02, H14,442 (Dec. 6, 2007), 2007 WL 4269999; 153 Cong. Rec. H14,453-02 (Dec. 6, 2007), 2007 WL 4270024.

4. Whether EPA violated the CAA, 42 U.S.C. § 7545(o)(7)(A), by failing to invoke its general waiver authority to reduce renewable fuel volumes despite clear evidence of severe environmental harms.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

A. The Energy Independence and Security Act and the Renewable Fuel Standard.

In 2007, in an effort to increase the production of renewable fuels and thereby reduce greenhouse gas ("GHG") emissions, as well as to move the United States toward greater energy independence, Congress passed the Energy Independence and Security Act ("EISA"), Pub. L. No. 110-140, § 202(a)(1), 121 Stat. 1492 (2007). *See* 42 U.S.C. §7545(o). EISA adopted and amended measures Congress enacted in the 2005 Energy Policy Act, under which gasoline sold in the United States had to contain a certain percentage of renewable fuel, defined as fuel produced from biomass, or natural gas produced from a biogas source, that is used to offset the amount of fossil fuel in traditional motor vehicle fuel. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1501(a), 119 Stat. 594.

To ameliorate the growing threat of climate change, Congress included in EISA a new Renewable Fuel Standard ("RFS") which, among other things, increased the volume of biofuel required for a fuel to qualify as renewable, set GHG emission standards, and restricted the type of land that could be used to satisfy the standard. 42 U.S.C. §§7545(o)(1)(A), 7545(o)(1)(I)(i). To effectuate these goals, Congress tasked EPA with promulgating regulations to ensure "that transportation fuel sold or introduced into commerce in the United States . . . on an

annual average basis, contains at least the applicable volume" of four distinct biofuel categories: renewable fuel, advanced biofuel, cellulosic fuel, and biomass-based diesel. 42 U.S.C. § 7545(o)(2)(B). The volume requirements are based in large part on each fuel's ability to achieve a certain percentage of GHG emissions reduction relative to traditional fuel. 42 U.S.C. § 7545(o)(2)(B).[1]

Under the statute, "renewable biomass" includes crop-based biomass, which Congress defined as "[p]lanted crops and crop residue harvested from agricultural land *cleared or cultivated at any time prior to December 19, 2007, that is either actively managed or fallow, and nonforested*." § 7545(o)(1)(I) (emphasis added). Thus, to avoid the harms associated with land conversion – including the release of tremendous volumes of GHG and degradation of biodiversity and habitat, which counteract the climate and environmental goals of EISA – the land used to grow qualifying crops must meet three criteria: it must have been (1) cleared or cultivated at any time prior to 2007, (2) actively managed or fallow (i.e., plowed but intentionally left unplanted to restore fertility) in 2007, and (3) nonforested in 2007. These requirements prevent land that was uncultivated as of the date of

[1] The categories are "nested" because the definition of "advanced biofuel" includes both "cellulosic biofuel" (which has a higher percentage of reduction in GHG emissions than the base definition of "advanced biofuel") and "biomass-based diesel" (which has the same or greater percentage reduction than "advanced biofuel"), 42 U.S.C. § 7545(o)(1). *See Am. Fuel*, at *1 (showing diagram of "nested" categories of fuel).

EISA's passage from being used to comply with its mandates. This in turn reduces GHG releases from the initial turning of the soil for cultivation as cropland, and avoids the negative environmental impacts associated with land conversion.

In addition to the land conversion limitations, EISA also drastically increases the biofuel requirements from prior levels. Under the Energy Policy Act, the renewable fuel volumes increased annually, from 4 billion gallons in 2006 to 7.5 billion gallons in 2012. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1501(a), 119 Stat. 594. EISA increases the annual volumes and extends the timeline for implementation, from 9 billion gallons in 2008 to 36 billion gallons by 2022. 42 U.S.C. § 7545(o)(2)(B).

EISA also contains a number of provisions that demonstrate a commitment to environmental protections and resource conservation beyond its climate goals. For example, the statute requires that every three years, EPA prepare and produce a report that examines the past and future impacts of the RFS program, including the following:

> (1) Environmental issues, including air quality, effects on hypoxia, pesticides, sediment, nutrient and pathogen levels in waters, acreage and function of waters, and soil environmental quality.
>
> (2) Resource conservation issues, including soil conservation, water availability, and ecosystem health and biodiversity, including impacts on forests, grasslands, and wetlands.
>
> (3) The growth and use of cultivated invasive or noxious plants and their impacts on the environment and agriculture.

42 U.S.C. § 7545 notes. EPA must also consult with the Secretary of Agriculture and the Secretary of Energy to set future volumes of renewable fuels, taking into consideration the impact of renewable fuel use on, among other things, "the environment, including on air quality, climate change, conversion of wetlands, ecosystems, wildlife habitat, water quality, and water supply." *Id.* § 7545(o)(2)(B)(ii). And EISA permits EPA to reduce volume standards below statutory targets if implementation of those volumes will lead to severe environmental harm. *Id.* § 7545(o)(7)(A).

EISA also amended Section 977 of the Energy Policy Act of 2005 to establish program goals to develop feedstocks "that are less resource and land intensive and that promote sustainable use of resources, including soil, water, energy, forests, and land, and ensure protection of air, water, and soil quality." EISA, Pub. L. No. 110-140, §232(a)(2)(D), 121 Stat. 1492. And it amended Section 307(d) of the Biomass Research and Development Act of 2000, 7 U.S.C. § 8606(d), to establish "the systematic evaluation of the impact of expanded biofuel production on the environment, including forest lands, and on the food supply for humans and animals." *Id.* §232(b)(3).[2]

In March, 2010, EPA issued a final rule for the new RFS under EISA. Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard

[2] This provision has now been moved to 7 U.S.C. § 8108.

Program, 75 Fed. Reg. 14,670 (March 26, 2010) (codified at 40 C.F.R. pt. 80). The 2010 rule largely incorporated the regulatory approach to renewable fuel tracking that EPA had previously established under the Energy Policy Act of 2005, *id*, but it implemented one important change. It introduced a new approach – aggregate compliance – for determining whether land was in cultivation prior to 2007 and thus whether the crops grown on the land can count toward the renewable fuel volume mandates. 75 Fed. Reg. at 14,701–03. Under this approach, EPA starts with a baseline determination of the total amount of "existing agricultural land" in the U.S. at the time of EISA's passage, which it calculated to be 402 million acres. *Id*. EPA then monitors agricultural acreage and compares it to this baseline figure. *Id*. If the amount of current agricultural land does not exceed this level, EPA will assume – without any verification – that crop-based biomass was grown on land cultivated prior to EISA's enactment. *Id*. In adopting this approach, EPA disregarded its initial proposal that required evidence that land used to produce feedstock for renewable fuel was in cultivation at the time of EISA's passage. *See* Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 74 Fed. Reg. 24,904, 24,909–11 (proposed May 26, 2009) (to be codified at 40 C.F.R. pt. 80). And it overlooked the fact that land comes out of cultivation for many reasons, including urbanization, and thus

countless acres of uncultivated land can be converted to cropland without altering the total amount of planted land.

B. The Endangered Species Act

The Endangered Species Act is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). In enacting the statute, Congress aimed "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such . . . species . . . ." 16 U.S.C. § 1531(b). Congress consciously decided "to give endangered species priority over the 'primary missions' of federal agencies," *Tenn. Valley Auth.*, 437 U.S. at 185, imposing substantive and procedural obligations on federal agencies to safeguard endangered and threatened fish, wildlife, plants, and their habitats. *See* 16 U.S.C. § 1536(a).

Pursuant to Section 7 of the ESA, federal agencies "shall" consult with the Services to "insure that any action authorized, funded, or carried out by such agency. . . is not likely to jeopardize" endangered or threatened species or "result in the destruction or adverse modification" of critical habitat. *Id.* § 1536(a)(2); *see also Am. Fuel*, at *25. The statute defines "action" broadly to include "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," including "the promulgation of regulations" and

"actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02. An action jeopardizes a listed species if it "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." *Id.* An action results in the "destruction or adverse modification" of critical habitat if it creates a "direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species." *Id.* This includes actions that "alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features." *Id.*

"To facilitate compliance" with Section 7, before taking any action, an agency must request that the Services identify any species that is listed or proposed to be listed present in the "action area," *see* 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c), which extends to "all areas to be affected directly or indirectly by the Federal action." 50 C.F.R. § 402.02. The agency must then determine whether the action "*may* affect listed species or critical habitat," 50 C.F.R. § 402.14(a) (emphasis added), considering the direct and indirect effects of the action, the effects of interrelated or interdependent activities, and the environmental baseline. 50 C.F.R. § 402.02; *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 178 (D.C. Cir. 2017). In making this determination, the agency must use "the best scientific

and commercial data available." 16 U.S.C. § 1536(a)(2). "The 'may affect' threshold for triggering the consultation duty under section 7(a)(2) is low." *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F. Supp. 3d 7, 12 (D.D.C. 2014); *see also Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012).

If the agency determines that an action may affect a species, it must formally consult with the Services. 50 C.F.R. § 402.14(a). If it concludes its action will have *no effect* on listed species or critical habitat, formal consultation is not required. *Id*. § 402.14(b) If it determines that the proposed action *may affect*, but is not likely to *adversely affect*, any listed species or habitat, it must obtain the written concurrence of the Services and no further consultation is required. 50 C.F.R. §§ 402.13(a), 402.14(b)(1).

Under the formal consultation process, the Services determine whether the proposed action is likely to jeopardize the continued existence of a listed species or to destroy or adversely modify critical habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h). If the Services find that the action will result in jeopardy or adverse modification, they will identify reasonable and prudent alternatives for the action that comply with Section 7. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3).

The ESA allows for citizen enforcement of Section 7. 16 U.S.C. § 1540(g). It provides that "any person may commence a civil suit . . . to enjoin any person, including the United States and any. . . agency . . . who is alleged to be in violation of any provision of this chapter or regulation issued under authority thereof." *Id.* § 1540(g)(1)(A).

II. FACTUAL BACKGROUND

A. The Renewable Fuel Standard Induces Increased Production of Renewable Biomass, Leading to Unfettered Land Conversion.

Since the enactment of EISA in 2007, EPA has steadily increased the volume of renewable fuel mandated under the program. *See, e.g.*, 42 U.S.C. § 7545(o)(2)(B) (setting the initial volume at 9 billion gallons for 2008); 83 Fed. Reg. at 63,706 (setting the 2019 volume at 15 billion gallons). This in turn has resulted in increased cultivation of corn and soy to be used for ethanol and biodiesel.

Indeed, according to EPA's own findings, "[t]he total production of corn and soybeans has increased over time since the enactment of EISA in 2007." EPA Office of Research and Development, *Biofuels and the Environment: Second Triennial Report to Congress*, June 29, 2018, EPA-HQ-OAR-2018-0167-1334, ("TR"), at 11, JA____. In its most recent analysis of the RFS program, EPA found that the production of biofuels in the U.S. has risen "from 14.1 billion gallons in 2012 to 16.6 billion gallons in 2016," with ethanol and biodiesel produced and

consumed in the largest quantities. *Id*. at 7, JA___. Between 2007 and 2016, planted corn increased by nearly 10 million acres, slightly less than the size of Massachusetts and Connecticut combined – from roughly 80 million acres between 2000 and 2007 to roughly 90 million acres between 2007 and 2016. *Id*. at 10, JA___. Planted soybeans increased from 70-75 million acres between 2000 and 2006 to 82-83 million acres from 2014 to 2016. *Id*. This increased production – which, at nearly 20 million acres, is roughly the size of South Carolina – corresponds with an increased use of this feedstock for biofuels: "[c]orn used for ethanol production as a percentage of overall corn production increased from 19% in 2007 . . . to between 38% and 42% between 2011 and 2016," *id*. at 11-13, JA___-__, while "[s]oybeans used for biodiesel production" increased as a percentage of overall soybean production "from 9% in 2007 to 13% in 2011." *Id*. at 13, JA___.

To satisfy the growing demand for corn and soy, producers have had to convert millions of acres of land to grow these crops. As EPA concluded, there has been "*an increase in actively managed cropland by roughly 4-7.8 million acres*" since the enactment of EISA. *Id*. at 37 (emphasis added), JA___.[3] "These changes are reported to be coming mostly from lands that were formerly in

[3] Additional corn and soy production occurred on land that was previously cultivated for other crops.

grassland for 20 or more years, and going to corn, soy, and wheat," *id.* at 38, JA___, and "[t]here is strong correlational evidence that biofuels are responsible for some of this observed land use change." *Id.* at 44, JA___.[4] Indeed, "[t]he first crop planted on converted land was dominated by corn (27%)," with soybeans close behind (20%). *Id.* at 34, JA___.

B. Land Conversion Has Deleterious Effects on Climate, the Environment, and Threatened and Endangered Species.

Land conversion resulting from increased production of renewable biomass has had – and will continue to have – a devastating impact on climate, the environment, and threatened and endangered species and their habitat. Uncultivated land serves as a critical source of carbon storage, so when this land is tilled, it exposes this stored carbon to oxygen, releasing tremendous amounts of carbon dioxide ("CO2") into the atmosphere. Declaration of Dr. Tyler Lark, Doc. No. 1773280 at 84-195, JA___-___("Lark"), ¶ 36, JA__.[5] Between 2008 and 2012, conversion of land to produce renewable biomass has released an estimated

[4] For example, one study showed "roughly 2.7 and 4.2 million acres of noncropland converted to cropland within a 50- and 100-mile radius of biorefineries, respectively, across the nation." TR at 35, JA___.

[5] This declaration, with its attached report and appendices, was included in the 2019 rulemaking record, *see* EPA-HQ-OAR-2018-0167-1036, Att., and attached to the Notice of Intent to Sue letter, *see* Doc. No. 1773280 at 50-72, JA___-__, and it reaches similar conclusions as EPA's Triennial Report.

94 to 186 teragrams of CO2-equivalent, equivalent to the annual emission of *34 coal-fired power plants or 28 million cars on the road*. *Id*.

Land conversion also releases vast quantities of nitrous oxide ("N2O"), a GHG that is approximately 300 times more potent than CO2. Newly cultivated cropland – in particular, land used to grow corn – requires increased nitrogen fertilization, only 40-50% of which is absorbed by the crops. The excess nitrogen either runs off with surface water, leaches into ground water, or is converted by soil bacteria into N2O which is then released into the atmosphere. *See, e.g.*, TR at 70, JA___; Comments of ActionAid et al, on "Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020," EPA-HQ-OAR-2018-0167-1036, Doc. No. 1773280, at 74-83 ("Comments"), at 2-3, JA___-__.

Moreover, as EPA noted in its recent Triennial Report, "[t]he conversion of environmentally-sensitive land to cropland consistent with increased production of current biofuel feedstock is associated with negative impacts to ecosystem health and biodiversity." TR at xii, JA___. In particular, expansion of biomass production is "occurring in ecologically sensitive areas," because other land is already planted, leading to "the loss of habitat and landscape simplification" that harms wildlife. *Id*. At the same time, "[i]ncreasing pesticide use for feedstock production" is causing harm "to pollinators, birds, soil-dwelling organisms, and other ecosystem services both in terrestrial and aquatic habitats," while

"[i]ncreased fertilizer applications of N[itrogen] for corn and of P[hosphate] for corn and soybean" are negatively effecting aquatic biodiversity. *Id*. at xii-xiii, JA___-__.

According to EPA's own findings, "[l]and use change" associated with the renewable fuel program, *i.e.*, eradication of native grassland to grow renewable biomass, "has been identified as one of the primary drivers of potential environmental impacts from an expanding biofuels industry." *Id*. at 20, JA___. It has negative impacts on water and soil quality, the results of which include harmful algal blooms as seen in Lake Erie, hypoxia as seen in the Gulf of Mexico, increases in erosion, the loss of soil nutrients and soil organic matter, including carbon, and increased nutrient and pesticide use affecting surface and groundwater, as well as ecosystem health and biodiversity. *Id*. at xi-xiii, 14, 17-18, JA___-__, ___, ___-__.

Collectively, land conversion and associated environmental impacts have had a deleterious effect on threatened and endangered species. As this Court recently found, "crop production and land conversion" associated with the RFS program "harms the habitats of numerous animals and fish," including those of listed species. *Am. Fuel*, at *22. EPA itself recognized that "degradation and loss of [wetlands] has been found to adversely affect grassland bird populations," while "the loss of wetlands to row crops and related production practices is associated

with reduced duck habitat and productivity of duck food sources, including aquatic plants and invertebrates." TR at 87, JA___. Production of renewable biomass has led to the loss of native grassland, simplification of landscape, reduction in biodiversity, and destruction and harmful modification of native habitat, including landscape fragmentation, nutrient run-off, eutrophication, and hypoxia, which each adversely affect threatened and endangered species. Lark ¶¶ 10-35, JA___-____. Listed species at risk include: Poweshiek skipperlings (butterflies), Dakota skippers, Rusty patched bumble bees, Hine's emerald dragonflies, Salt Creek tiger beetles, whooping cranes, yellow billed cuckoos, piping plovers, black-footed ferrets, Topeka Shiners, Arkansas River Shiners, Purple Bankclimbers, Fat Threeridges, Gulf Moccasinshells, Shinyrayed Pocketbooks, Oval Pigtoe mussels, Gulf Sturgeons, Loggerhead sea turtles, and sperm whales. *Id*. ¶¶ 15-35, JA___-____.

C. EPA Failed to Consult, Failed to Waive Volume Requirements Due to Severe Environmental Harm, and Included An Unlawful Aggregate Compliance Approach to Land Use.

Despite undisputed record evidence of the severe climate and environmental harms caused by the production of renewable biomass – including EPA's own Triennial Report – EPA concluded that the Final Rule "will have no effect on listed species or their critical habitat, either directly or indirectly" and therefore did not consult with the Services. EPA No Effects Determination Memorandum, EPA-HQ-

OAR-2018-0167-1404, JA____-____ ("No Effects Determination") at 1, JA___. Indeed, EPA never even took the required first step of reaching out to the Services for a list of species that may be affected by the Rule. Instead, EPA concluded that the 2019 volumes will "not affect the production of" renewable biomass, *id.* at 7, 8, JA___, ___, and that even if renewable biomass cultivation "were to be affected by the 2019 standards, any specific effects on listed species or critical habitat from these activities could not be attributed with reasonable certainty to the 2019 RFS standards." *Id*. at 2, JA___; *see also id.* at 3, 7, 11, 12, JA___, ___, ___, ___. It found no causal link between the 2019 Rule and land conversion and thus between the 2019 Rule and the climate, environmental, and species harms resulting from such conversion. *Id.* EPA further found that "there is not sufficient evidence to support a finding of 'severe environmental harm' that would justify the exercise of the severe environmental harm waiver authority" in the CAA. *Id*. at 12, JA___. EPA also included the aggregate compliance approach to land use in the Final Rule. *See* 83 Fed. Reg. at 63,741.

PROCEDURAL HISTORY

EPA published the Final Rule on December 11, 2018. 83 Fed. Reg. 63,704. On that same day, Petitioner Sierra Club sent EPA a 60-day Notice of Intent to Sue Letter, claiming that the Final Rule violated the ESA. Doc. No. 1773280 at 50-72, JA___-__. On February 11. 2019, 60 days after both promulgation of the Final

Rule and the 60-day notice letter, Environmental Petitioners timely filed their Petition for Review with this Court. Doc. No. 1773280.

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 under the ESA under the APA's arbitrary and capricious standard. *See Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 685 (D.C. Cir. 1982).

SUMMARY OF THE ARGUMENT

In promulgating the Final Rule, EPA failed to consult with the Services, relied on an aggregate compliance approach to determine whether certain land can be used to grow renewable biomass, and failed to lower the volume requirements despite clear evidence that land conversion resulting from the production of renewable biomass will cause severe environmental harms. The resulting regulation is therefore unlawful, in at least four ways:

First, the 2019 Rule violates the ESA. EPA unquestionably had a duty to consult with the Services before finalizing the Rule, and it failed to do so.

Second, the 2019 Rule violates the APA by relying on an arbitrary and capricious No Effect determination.

Third, the 2019 Rule violates the CAA. Despite statutory language prohibiting land not in cultivation as of December 2007 to be used to grow renewable biomass, EPA's aggregate compliance approach allows such land to be converted to satisfy the 2019 Rule's volume requirements, in contravention of statutory text and congressional intent.

And *fourth*, despite clear evidence of severe environmental harm, EPA failed to exercise is waiver authority to lower the volume requirements.

For these reasons, the 2019 Rule cannot stand.

STANDING

Environmental Petitioners have standing to challenge the 2019 Rule. *See Am. Fuel*, at *20 (holding that Environmental Petitioner Sierra Club satisfied the requirements for associational standing in a challenge to the 2018 rule setting renewable fuel volumes for 2019). This Court recently found that Petitioner Sierra Club had standing to challenge a 2018 rule setting renewable fuel volumes for 2019, *see id*., and the 2019 Rule is just the "next iteration" of the 2018 rule, setting similar volumes. *Id*. at *23. Here, as in the 2018 case, "EPA's Triennial Report and the Lark declaration provide evidence" that there is a "substantial probability" of injury. *Id*. "They describe the effects of the annual standards promulgated over the past decade" on habitats and the environment, "and the [2019] Rule is simply the next iteration of those standards. Thus, the report and declaration certainly

serve as evidence of the likely effects of the [2019] Rule." *Id*. These effects include "the conversion of uncultivated land into agricultural land for growing crops that can be used to make biofuels," which "harms the habitats of numerous animals and fish, . . . including – critically – the particular habitats of the whooping cranes and Gulf sturgeon." *Id*. at *22. The harms to species – including, but not limited to, the whooping cranes, Gulf sturgeon, piping plover, black footed ferret, and Poweshiek skipperlings – and to the environment injure Environmental Petitioners' members, *see, e.g.*, Declaration of J. Sibbing, attached as Exhibit 1, ¶ 7; Declaration of D. Helmers, attached as Exhibit 2, ¶¶ 6-10; Declaration of A. Viles, attached as Exhibit 3, ¶¶ 11-17; Declaration of A. Linhardt, attached as Exhibit 4, ¶¶ 9-10; Declaration of W. Fontenot, attached as Exhibit 5, ¶¶ 18, 20-22; Declaration of E. Giessel, attached as Exhibit 6, ¶¶ 9, 12, 17, 20-21, 23-26; Declaration of K. Slama, attached as Exhibit 7 ¶¶ 9-18. This is sufficient to establish standing to challenge the 2019 Rule under both the ESA and the CAA. *Id*.; *see also Ctr. for Biological Diversity*, 861 F.3d at 183-84 (concluding that environmental association had standing to challenge EPA's compliance with the ESA); *Friends of the Earth, Inc. v. Laidlow Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic

and recreational values of the area will be lessened by the challenged activity.'" (citation omitted)).

ARGUMENT

I. EPA VIOLATED THE ESA BY FAILING TO CONSULT BEFORE IMPLEMENTING THE 2019 RULE.

Under the ESA and its implementing regulations, an agency must initiate formal consultation with the Services prior to taking action if it determines that an action "may affect listed species or critical habitat." 16 U.S.C. § 1536; 50 C.F.R. § 402.14(a). This is a "low" threshold. *Nat'l Parks Conservation Ass'n*, 62 F. Supp. 3d at 12-13 (citing *Karuk Tribe of Cal.*, 681 F.3d at 1027). "Any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement." *Id.* (quoting Interagency Cooperation—Endangered Species Act of 1973, 51 Fed. Reg. 19,926, 19,949–50 (June 3, 1986)); *see also Karuk Tribe of Cal.*, 681 F.3d at 1027 ("[A]ctions that have any chance of affecting listed species or critical habitat—even if it is later determined that the actions are 'not likely' to do so—require at least some consultation under the ESA.").

As this Court recently held, ESA's Section 7 obligations apply to EPA's promulgation of renewable fuel standards. *See Am. Fuel*, at *25-26.[6] Thus, before

[6] The Court also held that the 2019 Rule does not qualify for the exception to the ESA's consultation requirements for statutory requirements that leave the agency

issuing the Final Rule, EPA had a mandatory duty to "insure" that the Final Rule was "'not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification' of designated critical habitat by adhering to the consultation process." *Id*. (alteration in original) (quoting 16 U.S.C. § 1536(a)(2)).

EPA does not dispute that the 2019 Rule triggered its obligations under the ESA, but instead claims that it did not have to consult the Services. No Effect Determination at 1, JA___. To support this contention, EPA relies on a "No Effect" Determination that concluded that "the 2019 RFS standards will have no effect on listed species or their critical habitat, either directly or indirectly," and thus decided it did not need to engage in formal consultation. *Id*. This determination is contrary to the evidence before the Agency, contrary to this Court's recent ruling in *American Fuel*, and thus does not absolve EPA of its duty to consult.

There can be no question that the 2019 Rule "may affect" listed species or critical habitat. As EPA itself concluded in its Triennial Report, "degradation and loss of wetlands" resulting from renewable biomass production "has been found to adversely affect grassland bird populations," while "the loss of wetlands to grow

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no discretion to act differently. *See Am. Fuel*, at *25 (finding the exception did not apply to the 2018 Rule because "the agency had discretion to reduce fuel volumes in at least two ways").

crops and related production practices is associated with reduced duck habitat and productivity of duck food sources, including aquatic plants and invertebrates." TR at 87, JA___. Indeed, land cultivation to produce renewable biomass has led to the loss of native grassland, habitat fragmentation, nutrient runoff, and reduction in biodiversity, among other harms. Lark ¶¶ 10, 13-15, 21-22, 28, JA___, ___-__, ___-__, ___. As this Court recently found, "[c]rop production and land conversion" associated with the renewable fuels program "harms the habitats of numerous animals and fish," including, notably, the whooping crane and Gulf sturgeon, two federally listed species. *Am. Fuel*, at *22-23; *see also* Lark, at Appendix 2-10, JA__-__ (report, research, and maps showing land use change since 2007, including conversion adjacent to critical habitat for endangered species such as the whooping crane and piping plover).

EPA tries to avoid this conclusion by maintaining that because the 2019 Rule does not change the volumes much, there is no additional conversion and thus no effect warranting consultation. *See, e.g.*, No Effect Determination at 2, JA___. This Court flatly rejected this argument with respect to the 2018 rule, explaining that EPA's own Triennial Report and a declaration by Dr. Tyler Lark "describe the effects of the annual standards promulgated over the past decade, and the 2018 Rule is simply the next iteration of those standards. Thus, the report and declaration *certainly serve as evidence of the likely effects of the 2018 Rule*." *Am.*

Fuel, at *23 (emphasis added); *see also id.* (noting that the Court has "a decade's worth of information, including EPA's own Triennial Report, on the effects of the Program's annual standards," and it thus "requires 'no great speculative leap' to conclude that" the 2018 Rule harmed Petitioners by threatening listed species). It is not the change in volumes from year to year, but rather the volumes themselves that have a "likely effect," incentivizing conversion while also keeping land that previously served as critical habitat planted for renewable fuel sources. *Id.* EPA's repeated contention that the 2019 Rule has no effect because any effect "could not be attributed with reasonable certainty to the 2019 RFS standards," *see, e.g.*, No Effect Determination at 2, 3, 7, 11, 12, JA___, ___, ___, ___, ___, is plainly untrue.

Moreover, these statements are legally insufficient to justify a "no effect" decision, as such statements are "not the same as a finding that the [2019] Rule 'will not affect' or 'is not likely to adversely affect' listed species or critical habitat." *Am. Fuel*, at *25. A statement that "it is impossible to know whether the [2019] Rule will affect listed species or critical habitat" is "not the same as determining that the [2019] Rule 'will not' affect them." *Id*. at *25-26.

As the Triennial Report and the Lark declaration make clear, the 2019 Rule unquestionably "may affect" threatened and endangered species. EPA thus had a

mandatory duty to consult the Services. It unquestionably failed to do so. Accordingly, EPA violated the ESA, rendering the 2019 Rule unlawful.

II. THE FINAL RULE VIOLATES THE APA BY RELYING ON AN UNREASONABLE NO EFFECT DETERMINATION.

Not only did EPA violate the ESA by failing to consult the Services, but it also violated the APA by relying on a No Effect determination that is both contrary to the evidence before the Agency and implausible. Under the APA, this Court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency action is arbitrary or capricious where the agency "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"). The No Effect determination – and the 2019 Rule that depends upon it – unquestionably qualify.

When it made its No Effect determination, EPA had before it numerous studies documenting the deleterious effects the RFS program has had on critical habitat and threatened and endangered species, including, for example, whooping cranes, Gulf sturgeons, black-footed ferrets, piping plovers, and more. *See, e.g.* TR at xii, 87, JA___, ___; Lark ¶¶ 10-35, JA___-__. As discussed *supra*, EPA's

own Triennial Report – released prior to EPA's No Effect determination and the 2019 Rule – describes these studies and the consequent adverse effects on ecosystems and biodiversity. TR at xi-xiii, 14, 17-18, 20, 87, JA___-__, ___, ___-__, ___, ___. The Lark Declaration – included in the 2019 rulemaking record – documents consistent findings, and shows conversion of grassland adjacent to designated critical habitat for endangered species. Lark ¶¶ 10-34 & appendices 6-10, JA___-__ & ___-___.

Upon reviewing the same evidence EPA had before it when issuing its No Effect determination, this Court concluded that "[c]rop production and land conversion" associated with the renewable fuels program "harms the habitats of numerous animals and fish," including, notably, the whooping crane and Gulf sturgeon, two federally listed species. *Am. Fuel*, at *22-23; *id*. at *23 ("[T]here is a 'substantial probability' that the EPA's ultimate decision adversely affected local conditions . . . harming cranes and sturgeon[s]."). It is thus contrary to the weight of the evidence, and entirely implausible, to conclude that the 2019 Rule – which is simply the next iteration of the 2018 rule – will not affect listed species or critical habitat. *State Farm*, 463 U.S. at 43; *see also Am. Fuel*, at *23 (rejecting EPA's argument that because the 2018 volumes are similar to prior volumes, it has no effect). EPA's No Effect determination is thus arbitrary, capricious, and contrary to law, and because the 2019 Rule relied on this unlawful determination, it cannot

stand. *Nat'l Parks Conservation Ass'n*, 62 F. Supp. 3d 7 (vacating rule because agency's no effect determination was arbitrary and capricious and agency violated ESA by failing to consult); *see also W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 498 (9th Cir. 2011) (enjoining regulation where agency's no effect finding and failure to consult were arbitrary and capricious).

III. THE 2019 RULE'S AGGREGATE COMPLIANCE APPROACH VIOLATES BOTH THE TEXT AND PURPOSE OF EISA.

In addition to its blatant violation of the ESA and the APA, the Final Rule likewise runs counter to the CAA as amended by EISA. Under EISA, Congress included unambiguous provisions to limit the conversion of previously uncultivated land to produce renewable biomass. 42 U.S.C. § 7545(I)(i). Despite this clear statutory framework, the 2019 Rule employs an "aggregate compliance" approach to determining whether land can be converted to produce renewable biomass. *See* 83 Fed. Reg. at 63,741. This scheme violates the text and purpose of the CAA, in two primary ways. *First*, it permits the conversion of land for the production of renewable biomass that was not in cultivation in 2007 despite the statute's unambiguous prohibition on such land conversion. *Second*, it results in the release of tremendous volumes of GHG, and contributes to water pollution, loss of biodiversity, and other environmental harms, thereby undermining the statute's climate and environmental objectives. Because the 2019 Rule runs

counter to the unambiguously expressed intent of Congress, it cannot stand. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

A. Aggregate Compliance Violates the Unambiguous Text of the Clean Air Act.

Under the familiar test set forth in *Chevron*, this Court need look no further than the text of the CAA to find that the Final Rule is unlawful. 467 U.S. at 842; *see also Meredith v. Fed. Mine Safety & Health Review Comm'n*, 177 F.3d 1042, 1053 (D.C. Cir. 1999) ("As always, the starting point of analysis is the text of the statute.").

The CAA unambiguously defines crop-based renewable biomass as "[p]lanted crops and crop residue harvested from agricultural land cleared or cultivated at any time prior to December 19, 2007, that is either actively managed or fallow, and nonforested." 42 U.S.C. § 7545(I)(i). The language could not be clearer in defining the land that can be used to produce renewable biomass.

Despite this explicit requirement, the aggregate compliance scheme permits the conversion of land that was neither cleared nor cultivated prior to December 2007, so long as the amount of land in use as cropland across the country remains below a threshold level. 75 Fed. Reg. at 14,701. In the Final Rule, rather than determining that renewable biomass was produced only on compliant land, EPA instead determined that the amount of land in cultivation "did not exceed the 2007 baseline acreage," and that therefore, there was no need to look at individual

compliance with the statute's mandates. 83 Fed. Reg. at 63,741. Despite the new evidence described above, EPA fails to recognize that land comes out of production for many reasons, including urbanization, such that previously uncultivated land can be converted to cropland without increasing the overall acreage in cultivation. And that is precisely what has happened under this scheme. As this Court recently found, EPA's annual fuel standards "likely cause the conversion of uncultivated land into agricultural land for growing crops that can be used to make biofuels," *Am. Fuel*, at *22, and much of this conversion has occurred on land that was not in production for 20 or more years, TR at 38, JA___, in direct contravention of the land-use restrictions contained in the law. The 2019 Rule is thus at odds with the clear language of the statute, and is therefore unlawful. *Chevron*, 467 U.S. at 842.

B. The Aggregate Compliance Approach Undermines EISA's Climate and Environmental Purposes.

Not only is aggregate compliance contrary to the unambiguous language of the statute, but it also runs afoul of congressional intent. The legislative history clearly sets forth EISA's purposes: to reduce GHG emissions, and to protect the environment from degradation to the water, air, wildlife habitat, and natural landscape. *See, e.g.*, 153 Cong. Rec. H14,451-02 (noting that EISA "eliminate[es] greenhouse gases equivalent to 28 million cars from our roads[,]. . . includes a

renewable fuels standard that contains safeguards to reduce carbon emissions and protect our environment[, and] . . . takes the right steps forward to . . . fight global warming."); 153 Cong. Rec. H14,453-02 (describing EISA as "tak[ing] the long[-]overdue first steps toward addressing global climate change," and "drastically reduc[ing] our greenhouse gas emissions."); 153 Cong. Rec. E2665-01, 2007 WL 4556844, *E2666 (Dec. 18, 2007) (stating that EISA "adds some important environmental safeguards to the RFS program, including ones that will help protect certain wildlife habitats and special eco-systems.").[7]

The aggregate compliance scheme in the Final Rule undermines these climate and environmental goals by allowing millions of acres of previously undeveloped land to be converted to agricultural use, resulting in increased GHG emissions and numerous harms to the water, air, wildlife habitat, and natural landscape. *See, e.g.*, TR at xi-xiii, 14, 17-18, 20, 87, JA___-__, ___, ___-__, ___, ___; Lark ¶¶ 10-36, JA___-___; Comments at 2-3, JA___-__. Since the passage of EISA, under the aggregate compliance scheme, there has been *an increase of between 4-7.8 million acres of actively managed land*, which includes the

[7] In signing EISA into law, Present George W. Bush called the legislation "a major step" toward "confronting global climate change" that "will lead to some of the largest CO2 emission cuts in our nation's history," and noted that the "measures" in EISA would "help us improve our environment." *President Bush Statement at Signing, President Bush Signs H.R. 6, The Energy Independence and Security Act of 2007*, 2007 WL 4429070, at *1-2.

conversion of millions of acres of ineligible land for ethanol and biodiesel feedstock. TR at 111, JA___; *see also* Lark ¶ 8, JA__ (estimating "roughly 2 million acres of expected cropland expansion due to the impact of the Renewable Fuel Standard on national corn prices"); *id*. ¶ 13, JA__ ("[N]ative grasslands and prairie have specifically been identified as having been converted to cropland in recent years."). This land conversion is coming "mostly from lands that were formerly in grassland for 20 or more years, and going to corn, soy, and wheat." TR at 38, JA___. As discussed *supra*, *see* 23-26, this conversion has had – and will continue to have – severe climate and environmental impacts, undermining the purposes of the law.

These climate and environmental harms run counter to EISA's goal of reducing GHG emissions and protecting the environment. By failing to restrict land conversion and not requiring proof of individual compliance as EPA originally proposed, the 2019 Rule contributes to these harms, undermining the protections EISA sought to implement. This is contrary to clear congressional intent, and is illegal. *Chevron*, 467 U.S. at 842-43.

IV. EPA VIOLATED THE CLEAN AIR ACT BY FAILING TO EXERCISE ITS WAIVER AUTHORITY DESPITE EVIDENCE OF SEVERE ENVIRONMENTAL HARM.

The 2019 Rule is also unlawful under the CAA because EPA failed to exercise its waiver authority despite ample evidence (described *supra*) of severe

environmental harm caused by the Rule. Pursuant to 42 U.S.C. § 7545(o)(7)(A), EPA may lower the RFS volume requirement where it determines "that implementation of the requirement would severely harm the economy or the environment." EPA arbitrarily failed to exercise its waiver authority, instead determining that "there is insufficient record to support a finding that the 2019 RFS standards would cause severe environmental harm," and that they would not "induce increased crop cultivation or associated land used changes, or otherwise affect listed species or critical habitat." No Effect Determination at 13, JA___. This is in direct contravention of EPA's own findings in the Triennial Report, as well as this Court's recent ruling, *see Am. Fuel*, at *23, rendering EPA's failure to exercise its waiver authority arbitrary and capricious, and thus unlawful. *See, e.g.*, *Fla. Mun. Power Agency v. FERC*, 411 F.3d 287, 292 (D.C. Cir. 2005) (explaining that an "agency act[s] arbitrarily by failing to give 'meaningful consideration' to [an] application for [a] waiver", and finding agency's failure to address the waiver request satisfied this standard. (citation omitted)); *see also Fiber Tower Spectrum Holdings, LLC v. FCC*, 782 F.3d 692, 700-01 (D.C. Cir. 2015) (vacating order denying discretionary waiver request where agency based its decision on an inaccurate understanding of the record). For this reason too, the Rule cannot stand.

CONCLUSION

For the foregoing reasons, this Court should find that the 2019 Rule violated the ESA, the APA, and the CAA, and should remand the Rule to EPA with an order to consult with the Services, require individual compliance with the CAA's land-use restrictions, issue a waiver for the volume requirements based on severe environmental harm, and provide any other relief this Court deems appropriate.

Dated: October 4, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations in this Court's Order of August 20, 2019 because it contains 7,730 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B) and D.C. Cir. Rule 32(e)(1). Microsoft Word 2016 computed the word count.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Microsoft Word 2016 Times New Roman) in 14-point font.

Dated: October 4, 2019

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Exhibit 1

NOT YET SCHEDULED FOR ORAL ARGUMENT
Case Number 19-1023 and consolidated cases

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL WILDLIFE FEDERATION, HEALTHY GULF, AND SIERRA CLUB, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and ANDREW R. WHEELER, Administrator, United States Environmental Protection Agency Respondent.	No. 19-1039 (consolidated with 19-1023, 19-1027, 19-1032, 19-1033, 19-1035, 19-1036, 19-1037, 19-1038)

DECLARATION OF JULIE SIBBING

DECLARATION OF JULIE SIBBING

I, Julie Sibbing, declare as follows:

1. I work for the National Wildlife Federation ("NWF"), serving as Associate Vice President of Land Stewardship, in NWF's National Advocacy Center in Washington, D.C. In this capacity, I am accountable for NWF's national campaign to encourage congressional, administrative, and other actions that protect habitat and promote healthy wildlife populations on our working lands, including farm lands and adjacent habitat areas. I have been deeply engaged in the issue since 2004. In this capacity, I have played a leadership role in NWF's campaign to reform the Renewable Fuel Standard (RFS) to ensure that it protects wildlife habitat and does not promote destructive practices that result in habitat loss and degradation, polluting runoff, and impacts to species, including threatened and endangered species under the Endangered Species Act (ESA). In particular, I am leading work to oppose elements of the U.S Environmental Protection Agency's Renewable Fuel Standard that are not protective of wildlife, habitat, and ESA listed species.

2. NWF is one of the nation's largest member-supported nonprofit conservation advocacy and education organizations. NWF has more than six million members, partners, and supporters nationwide, and affiliate organizations in fifty-two states and territories. NWF is headquartered in Reston, Virginia, with field offices throughout the United States. The mission of NWF is to unite all Americans to ensure wildlife thrives in a rapidly changing world. A major concern of NWF is the protection of working lands, such as agricultural lands and nearby habitat, as well as aquatic and terrestrial environments that are impacted by agricultural activities. NWF has been advocating for the protection of vital habitats impacted by agricultural activities, such as

grasslands, forest, wetlands, streams, and rivers, upon which wildlife depends, since its founding in 1936.

3. NWF has actively worked on behalf of its members to ensure protection of habitats impacted by agricultural activities, and specifically those impacted by the requirements of the Renewable Fuel Standard. In particular, NWF has dedicated staff time and efforts – including education and mobilization of its members – to reforming the Renewable Fuel Standard to ensure that it does not have adverse impacts on wildlife and habitat. This has included working to ensure that the EPA does not take actions that effectively incentivize the conversion of non-agricultural land to agriculture in a manner that destroys or degrades habitat or encourages the intensification of crop production in a manner that degrades habitat or increases pollution.

4. NWF has also worked extensively over its history, and since the passage of the ESA, to ensure that federal actions do not jeopardize threatened and endangered species, including extensive engagement with agencies, as well as legal actions such as litigation that has resulted in protections for salmon, wolves, and Florida key deer, to protect ESA listed species that are at risk from agency action.

5. Because protecting habitat from degradation and destruction is fundamental to NWF's mission, NWF has worked on behalf of its members and affiliates to oppose implementation of the Renewable Fuel Standard in a manner that results in the conversion of habitat to crop production and crop intensification that degrades habitat and results in increased pollution which harms wildlife and ESA listed species.

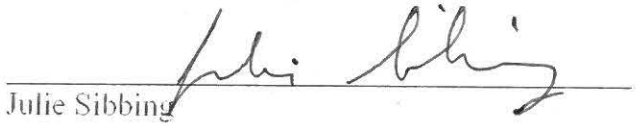
6. NWF has provided formal comments on annual volume setting rules, petitioned the agency to implement the law's land use change prohibitions, commented on triennial reports

to Congress on the environmental impacts of the policy, met with EPA and White House staff to outline our concerns with the program's implementation, testified before Congress, and funded a large body of scientific research regarding the land use and associated carbon, water quality, water quantity and species impacts of the RFS.

7. NWF has many active members who have taken action to oppose RFS policies that destroy or degrade habitat or that impact ESA listed species. These members use and enjoy the wildlife and habitat areas that will be impacted by the EPA's RFS Volume Standards for 2019. For instance, members hunt on lands and wetlands impacted by increases crop production that has reduced or degraded available habitat. Members fish in streams in rivers where fish habitat is being lost or negatively impacted by nutrient pollution caused by crop intensification or conversion of grassland to cropland. Similarly, many members take special joy in venturing into nature to catch a rare glimpse of an ESA listed species like the piping plover, yellow billed cuckoo, or whooping crane.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on September 30, 2019



Julie Sibbing

Exhibit 2

NOT YET SCHEDULED FOR ORAL ARGUMENT
Case Number 19-1023 and consolidated cases

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL WILDLIFE FEDERATION, HEALTHY GULF, AND SIERRA CLUB, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and ANDREW R. WHEELER, Administrator, United States Environmental Protection Agency Respondent.	No. 19-1039 (consolidated with 19-1023, 19-1027, 19-1032, 19-1033, 19-1035, 19-1036, 19-1037, 19-1038)

DECLARATION OF DOUG HELMERS

DECLARATION OF DOUG HELMERS

I, Doug Helmers, declare as follows:

1. I am a resident of Rothville, Missouri, where I have lived for seventeen years. I am a current member of the National Wildlife Federation ("NWF").

2. I regularly recreate in the outdoors throughout the Mississippi River Basin ("the Basin")—including trips to North and South Dakota, Iowa, Missouri, Louisiana, and Texas to hunt, fish, hike, and observe wildlife. I have also been traveling down to Florida annually for the past ten years to fish and observe wildlife, including observing migratory species like the Piping Plover.

3. For the past ten years, I worked for the United States Fish and Wildlife Service ("FWS"), where I served as the Iowa Private Lands Coordinator. I also served as the head for the Iowa Partners for Fish and Wildlife Program which assists private landowners in their efforts to conserve and reestablish wildlife habitats. My primary duty was supervisory—coordinating efforts to acquire funding for field biologists—but I would also visit sites on occasion. I took a strong vested personal interest in the work of restoring and protecting habitat for species in the region, including species listed as threatened or endangered under the Endangered Species Act such as the Piping Plover and Yellow-billed Cuckoo – a passion I have carried into my retirement from the Service. Also, prior to my time at FWS, I worked for fifteen years as a wetlands biologist at the Natural Resources Conservation Service ("NRCS") where I gained familiarity with and cultivated an interest in a variety of species dependent on clean water and healthy habitats such as prairie and grassland, wetlands, and woodland habitat.

4. The Iowa, Missouri and surrounding middle Mississippi basin landscapes are a patchwork of agricultural plots, grassy pastures, native prairie and deciduous woodland. I

routinely trek into the Iowa and Missouri wilderness to observe native wildlife, and am an avid waterfowl hunter. During my time working and living in this region, I have observed large tracts of pasture and prairie land being converted to agricultural use—primarily for corn and soybean production. This trend escalated sharply around 2008, following the passage of the Energy Independence and Security Act of 2007 ("EISA"). During a recent trip to the Dakotas, I was staggered by the explosion of cornfields in the region. Areas that I thought would never be converted—areas that were, in my eye, patently un-ideal for corn growing—had become farms, seemingly overnight.

5. Additionally, my career with FWS has made me keenly aware of the water quality problems associated with the conversion of natural spaces and pastures to agricultural farmland. Local farmers have increasingly used tile draining, or "tiling," to expand corn and soybean production into marginal lands. Farming these marginal lands very effectively shunt silt, sand, dirt, loose topsoil, and fertilizer into adjacent waterways. I have observed the impacts of increased tillage firsthand. Both in my private and professional life, I have watched agricultural runoff and sedimentation from cropland expansion devastate wild spaces.

6. My ability to recreationally fish in Mississippi river tributaries has been directly impacted by heavy nutrient and sediment loads. For example, in the summer of 2019, I took a trip to Louisiana to fish for Speckled Trout and Redfish. Due to heavy sedimentation from the Mississippi River, the waters were nearly devoid of either species. Continued degradation of waters would make it less likely that I will be able to recreate and fish in such areas in the future.

7. My enjoyment of the outdoors is strongly tied to my ability to observe and be present in nature with native fauna, including several threatened and endangered species. In my capacity as the Iowa Private Lands Coordinator, I worked to restore Topeka Shiner habitat. FWS would

regularly coordinate with private landowners to rehabilitate "oxbows" to make them suitable for Topeka Shiner populations—particularly along tributaries of the Raccoon River and the Boone River in North-Central Iowa. I have also worked in the past to conserve Piping Plover populations. I regularly watch, and enjoy watching, Yellow-Billed Cuckoo on my own property. I both watch and hunt pheasants on my regular treks into the wild areas of the Mississippi River Basin, and have gone searching for Dakota Skippers and Poweshiek Skipperlings. Particularly in Florida, I often watch Piping Plover.

8. I am aware, both through my work and from being a lifelong nature enthusiast, that several of the above species are being pushed to the brink of extinction by habitat loss and water quality degradation. I also know that this loss is occurring, in part, because of the conversion of natural and open spaces to cornfield and other agricultural production, which results in direct loss of habitat as well as increased runoff of nutrient pollution into waterway.

9. Injury to any of these vunerable species would substantially diminish my enjoyment while recreating near my home and to locations I travel throughout the nearby region in the middle Mississippi basin. My use and enjoyment of the Basin's wild spaces is injured by the conversion or degradation of Topeka Shiner, Piping Plover, Yellow-Billed Cuckoo, Dakota Skipper, Poweshiek Skipperling, and other species' habitat. I have invested a life's work in protecting these species and now, in retirement, I like to enjoy the opportunity to observe them when I recreate. I hope to be able to witness their recovery but am concerned that unsustainable habitat loss and water pollution due in large part to increased agricultural production may imperil such recovery.

10. I also lament, as a naturalist, any loss of biodiversity. The loss of any one species would unalterably degrade the quality and character of the nearby ecosystems that I regularly use and

enjoy, and restricts the range of recreational activities I can take part in. Loss of a species would deprive me of the opportunity to see such a species again, which would make future treks into the woods, fields, and waters I enjoy a lonelier, less fulfilling experience.

11. It is my understanding that much of the increased corn and other agricultural production that is resulting in habitat loss and degradation, including impacts to water quality, in my homeland of Missouri and nearby areas where I recreate is the result of the the Environmental Protection Agency's ("EPA") setting Renewable Volume Obligations ("RVOs") that ignore impacts to species and habitat and encourage increased crop production, leading to land conversion.

12. An order from the court directing EPA to reconsider the specific RVOs, taking sensitive, threatened, or endangered species into account, as well as accounting for harmful impacts to the environment, would redress my injury by removing or reducing the incentive for local farmers to convert forest, pasture, wetlands, and prairie lands to cornfield. Dialing back the federally-established and federally-fixed demand for corn and other biomass covered under the Renewable Fuel Standards program would eliminate or lessen one stress vector currently impacting these species, which would help allow me to continue using the nearby ecosystems I enjoy as I have for decades.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on 9/29/19

Doug Helmers

Exhibit 3

NOT YET SCHEDULED FOR ORAL ARGUMENT
Case Number 19-1023 and consolidated cases

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL WILDLIFE FEDERATION, HEALTHY GULF, AND SIERRA CLUB, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and ANDREW R. WHEELER, Administrator, United States Environmental Protection Agency Respondent.	No. 19-1039 (consolidated with 19-1023, 19-1027, 19-1032, 19-1033, 19-1035, 19-1036, 19-1037, 19-1038)

DECLARATION OF AARON VILES

DECLARATION OF AARON VILES

I, Aaron Viles, hereby state as follows:

1. I am of legal age and am competent to give this declaration. All information herein is based on my own personal knowledge unless otherwise indicated. I give this declaration for use in the Sierra Club's legal challenge of the Environmental Protection Agency's (EPA) violations of the Endangered Species Act.

2. I lived in New Orleans, Louisiana for 17 years. In July of 2018 my family relocated to Lexington, KY. As I have many close friends in New Orleans and am on the Board of Directors for the Gulf Restoration Network, I intend to return to New Orleans at least once every six months.

3. I have been a dues-paying member of the Sierra Club since 1999. The Sierra Club is a nationwide non-profit environmental membership organization whose purpose is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives. I am informed that the Sierra Club has 3,413 members in Louisiana.

4. I have also been a supporter and member of Healthy Gulf (formerly Gulf Restoration Network) since 2004. I was on staff at Healthy Gulf from 2004 until

August 2013. While employed at Healthy Gulf, I was the Fisheries Campaign Director, the Campaign Director, and ultimately the Deputy Director. Healthy Gulf is a nonprofit environmental organization based in New Orleans, Louisiana. The mission of Healthy Gulf is to unite and empower people to protect and restore the natural resources of the Gulf Region.

5. In December 2013, I joined the Board of Directors for Healthy Gulf. I became chair of the Board in June 2017.

6. I am a member of the Sierra Club because I passionately agree with the mission to explore, enjoy, and protect the environment. John Muir's insights into our creator, viewed through His creation, inspire me nearly every day.

7. I am a member of Healthy Gulf because I love the Gulf and its marine and coastal wildlife and want the natural resources of the region restored and protected so that my daughters can explore and enjoy the region as I have been able to.

8. I have held several leadership positions and had many accomplishments within the Sierra Club. From 2006 to 2010, I was the Delta Chapter and New Orleans Group political chair. In 2007 I earned the New Orleans Group Award. In 2006 I was the winner of the National Environmental Alliance Award.

9. One Sierra Club accomplishment that I am particularly proud to have

been involved in is the development and implementation of the Delta Chapter campaign to stop permitting and construction of off-shore liquefied natural gas (LNG) terminals in the Gulf. This effort was successful and helped protect marine species in the Gulf, including the federally protected Gulf Sturgeon, loggerhead turtle, and sperm whale.

10. The expansion of corn production through conversion of uncultivated land, spurred on by the Renewable Fuel Standard, is troubling because it increases nutrient runoff into waterways that feed into the Mississippi River and the Gulf of Mexico, waterbodies which are already far too taxed with this type of pollution. I feel frustrated that this runoff is allowed to continue largely unabated, harming the very species that I worked to protect with the Sierra Club.

11. When I lived in New Orleans I rode my bicycle multiple times a week along the Mississippi River, enjoying the wildlife easily viewed from the levee trail. Species I saw there often included bald eagles and other birds of prey and river otters. I know this is also Gulf sturgeon habitat, and I enjoyed looking for them as well. There was also a bike ride I would often take on Saturdays near the Rigolets-- the confluence of the Gulf and Lake Pontchartrain. This area is great habitat for sea turtles, piping plovers, and sturgeons. Looking for these species is a large part of why I would go on this ride. I intend to return to both of these bike rides during my visits to New Orleans. My enjoyment of these rides would be

diminished by the loss of these species I enjoy searching for and sometimes seeing.

12. In the wake of the BP drilling disaster in April 2010 I spent numerous hours in the wetlands and the waterways of the Gulf, monitoring for oil and its impacts. Primarily, this monitoring was done from boats, but I have also participated and led monitoring/viewing trips from airplanes. These monitoring trips focused on oil impacts as well as wetlands restoration efforts planned and underway. Between 2006 and 2011 I led an annual trip in October focused on educating musicians performing at the Voodoo Music Experience. After 2010 and the BP disaster these trips occurred far more frequently, on average bi-monthly until 2012. On these trips we could also see the devastating impacts from nutrient runoff.

13. While out monitoring the Gulf we would sometimes see sperm whales and loggerhead sea turtles. Seeing these creatures was truly an amazing event, leaving a huge impression on me. After the BP disaster, we worked really hard to make sure that the habitat restoration and recovery plans for the Gulf protected sea turtle habitat and restored it wherever possible. As we continue to monitor the health of the Gulf and how it has improved since the disaster, it would be very valuable to be able to study how the whales and sea turtles have thrived—or not—since.

14. It is frustrating that after all of our hard work to help these species recover, that their populations are further endangered by the Renewable Fuel Standard.

15. Impacts on wildlife from the Renewable Fuel Standard also interfere with our ability to gauge how well the plans we made for recovery after the BP disaster have been working. The lack of oversight over the impacts of the Renewable Fuel Standard on the Gulf's endangered and threatened species seems to me like the height of irresponsibility.

16. I have become particularly interested in the sperm whale, and have a scientific interest in continued monitoring of the species. If this species is lost and researchers are no longer able to study it, I will lose out on personal educational opportunities to learn more about the sperm whale.

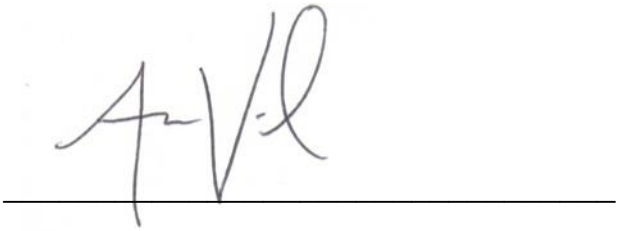
17. I have family friends who live in Lafitte, Louisiana on the water and own a boat. Although my family has relocated to Kentucky, we still plan on many boat trips to catch crabs, fish, and shrimp, hopefully annually. We usually go to Grand Lake, Big Lake River, and out to Grand Isle, which is Louisiana's biggest barrier island. These areas are all excellent habitat for Gulf sturgeon, loggerhead sea turtles, and piping plover, and I enjoy looking for these species. I have done a great deal of work to protect the Gulf sturgeon in particular, but have not yet seen the species in the wild. I enjoy seeing their habitat and would like to see a

healthy Gulf that can support populations great enough that I might one day see a sturgeon while out boating on these annual trips. We do often see the sea turtles. On future trips I plan to continue to look for these species. If the diminished water quality from nutrient and pesticide runoff affects the ability of these waterways to sustain thriving populations of these animals that would greatly reduce my enjoyment of the waterways.

18. It is my understanding that the Sierra Club and Healthy Gulf, along with National Wildlife Federation, are filing this lawsuit against the EPA for failing to initiate and complete consultation with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service in taking actions under the Renewable Fuel Standard, thus violating the Endangered Species Act. I understand also that EPA has allowed land that was uncultivated prior to 2007 to be converted to cropland and failed to use its general waiver authority to reduce renewable fuel volumes. I support the Sierra Club in this endeavor. If the Sierra Club is successful, all who value and utilize these waterways will benefit from knowing that the impacts of the Renewable Fuel Standard have been adequately studied and well-understood, myself included. Additionally, prohibiting conversion of land that was uncultivated prior to 2007 and reducing renewable fuel volumes will reduce expansion of cropland for corn ethanol and better protect species that live near these waterways.

I declare under the penalty of perjury under the laws of the United States that, to the best of my knowledge, the foregoing is true and correct.

Dated September 30, 2019



Aaron Viles

Exhibit 4

NOT YET SCHEDULED FOR ORAL ARGUMENT
Case Number 19-1023 and consolidated cases

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL WILDLIFE FEDERATION, HEALTHY GULF, AND SIERRA CLUB, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and ANDREW R. WHEELER, Administrator, United States Environmental Protection Agency Respondent.	No. 19-1039 (consolidated with 19-1023, 19-1027, 19-1032, 19-1033, 19-1035, 19-1036, 19-1037, 19-1038)

DECLARATION OF ANDREW LINHARDT

DECLARATION OF ANDREW LINHARDT

I, Andrew Linhardt, hereby declare as follows:

1. I am of legal age and am competent to give this declaration. All information contained herein is based on my own personal knowledge unless otherwise indicated. I give this declaration for use in the Sierra Club's legal challenge of EPA's promulgation of The Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020, 83 Fed. Reg. 63,704, Dec. 11, 2019, and specifically its failure to consult with the U.S. Fish and Wildlife Services and the National Marine Fisheries Services before doing so, its inclusion of provisions that incentivize the conversion of uncultivated land for the production of renewable biomass, and its failure to issue a waiver for severe environmental harm.

2. I am the Deputy Advocacy Director for the Sierra Club's Clean Transportation for All campaign. I have held this position for one month. Prior to this particular position, however, I held the title of Deputy Legislative Director for Transportation for 4.5 years.

3. Sierra Club's mission is to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's resources and ecosystems; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives. Sierra Club and its members are concerned about the effects of air pollution on human health and the environment and have a long history of involvement in activities related to air quality, clean transportation, preservation of wildlife and native habitat, and the Clean Air Act. Sierra Club and its members also are concerned about and have a longstanding history in land and water protection and the preservation of native ecosystems and habitat for species. As an environmental group, we are often involved in evaluating the impacts of government programs such as the Renewable Fuel

Standard (RFS). Our ability to accomplish our mission and serve our members is jeopardized by the EPA's failure to complete the appropriate environmental and air quality reviews and share that information publicly.

4. While my title at the Sierra Club has recently changed, I have spent the last several years serving as, and continue to be the main coordinator for, our campaign around renewable fuels. This entails developing and pushing federal policy which includes reform of the RFS to forge a more climate and environmentally friendly approach. I am the main point person in coordinating between the legal, communications, organizing, and other teams for this campaign.

5. Through my work with the Sierra Club, and my prior employment on Capitol Hill as well, I understand that the RFS requires reduction and replacement of petroleum-based fuels with a certain volume of renewable fuel. Under the RFS program, EPA is required to set renewable fuel volumes for our nation's fuel mix every year. I also understand that EPA has largely increased those volumes year after year to meet statutory targets of 36 billion gallons of renewable fuels by 2022 and has met the 2015 target of 15 billion gallons of total renewable fuels, which includes conventional corn-based ethanol. The RFS also empowers the EPA to review and approve new feedstocks for qualification as renewable fuels.

6. In the 2019 Rule, EPA set the total renewable fuel volume at 15 billion gallons. It also continued to follow an approach to land use that looks at the total amount of land in cultivation currently and compares this to the amount of cropland that existed in 2007 when the Energy Independence and Security Act (EISA), which establishes the RFS program, went into effect. As long as the total aggregate amount of land does not exceed the 2007 levels, EPA does

not look at whether the land used to grow renewable biomass meets EISA's prohibition on land not in cultivation in 2007 to be used for renewable biomass.

7. The Sierra Club and our Clean Transportation for All campaign have been actively engaged in reforming the RFS for about two years. I personally was working on this issue for about two years prior to that as well, as a staffer on Capitol Hill. Since coming to the Sierra Club, I have helped coordinate such activities around the RFS including submitting organizational and thousands of our members' comments on the proposed volumetric standards, speaking out in the media and on Capitol Hill, and educating and engaging our members and volunteers on this issue. Specifically, my advocacy, education and commenting address the potential environmental and air quality impacts of the RFS and the increasing concerns over massive land conversion and associated impacts resulting from increasing volumes of renewable fuels.

8. There is a lot of research out there demonstrating that corn ethanol, which comprises the vast majority of biofuels, is bad for the environment. Increased demand for corn has driven land use changes that have affected climate and pushed corn production onto native prairie and grasslands. Growing that much corn is an intensive agricultural process, demanding a ton of fertilizer and pesticides which then leach into our waterways.

9. Sierra Club members are concerned about the potential harms of the RFS. The Sierra Club has members who live in urban areas with high concentrations of motor vehicles who report experiencing respiratory problems associated with the burning of high-ethanol fuels. We also have members who live, work, and recreate in areas of the U.S., especially the Midwest, where they have watched their beloved grasslands and native prairies be planted over with vast and intensive fields of corn and other feedstocks for biofuels. Our members residing near and

recreating in the Gulf of Mexico and its tributaries have witnessed increased nutrient-induced hypoxic conditions that are creating inhospitable conditions for aquatic and marine life they study.

10. Our members, as well as myself, are concerned about the ways in which the negative impacts of the RFS will impact species and their aesthetic and recreational interests. In particular, we have serious concerns that the RFS is impacting wildlife populations and contributing to increased pollution in the waterways in which we recreate. Increased corn production on historically uncultivated land involves significant applications of fertilizer and pesticide which results in increased nutrient runoff into waterways that feed crucial waterbodies, like the Mississippi River and the Gulf of Mexico. This pollution could have disastrous water pollution consequences, like algae blooms that lead to uninhabitable hypoxic conditions for already endangered species like the federally threatened Gulf sturgeon, endangered species of sea turtle, and the endangered piping plover. Many of our members not only work tirelessly to monitor these species, but also recreate in these areas to observe them in their natural habitat. Bird watching is a favorite past time of many Sierra Club members, and others like to bike and canoe on rivers where they can see these special creatures.

11. Increased corn cultivation and resultant eradication of native grasslands and prairies also adversely affects our members' interest and enjoyment in studying and enjoying butterfly and other pollinator species.

12. Put simply, the RFS has caused and continues to threaten irreversible damage to these special places and the wildlife that thrive in them, and it has diminished our members' enjoyment of these special places.

13. The EPA failed to consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service when they took action under the 2019 RFS. It also failed to issue a waiver to the volumes for severe environmental harm. And it fails to ensure that newly converted land is not used to produce renewable biomass. Due to the induced land conversion associated with the standard, the large number of species and critical habitat that will be impacted by it, and the severe environmental harm it will cause, the EPA should have initiated Endangered Species Act consultation, and should have issued a waiver. EPA's failure to consult, failure to issue the waiver, and failure to ensure native grassland is not used to produce renewable biomass harms our members' interests. These interests would be redressed by a court order requiring consultation, requiring a waiver, and ensuring that the land use restrictions required by law were followed.

I declare, under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

Executed this 1 day of October, 2019.

Andrew Linhardt

Exhibit 5

NOT YET SCHEDULED FOR ORAL ARGUMENT
Case Number 19-1023 and consolidated cases

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL WILDLIFE FEDERATION, HEALTHY GULF, AND SIERRA CLUB, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and ANDREW R. WHEELER, Administrator, United States Environmental Protection Agency Respondent.	No. 19-1039 (consolidated with 19-1023, 19-1027, 19-1032, 19-1033, 19-1035, 19-1036, 19-1037, 19-1038)

DECLARATION OF W. FONTENOT

DECLARATION OF WILLIAM A. FONTENOT

I, William A. Fontenot, hereby state as follows:

1. I am of legal age and am competent to give this declaration. All information herein is based on my own personal knowledge unless otherwise indicated. I give this declaration for use in the Sierra Club's legal challenge of the Environmental Protection Agency's (EPA) violations of the Endangered Species Act and Clean Air Act.

2. I currently reside in Baton Rouge, Louisiana I have lived in this part of Louisiana all of my life.

3. I have been a dues-paying member of the Sierra Club since 1971. The Sierra Club is a nationwide non-profit environmental membership organization whose purpose is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.

4. When I first joined the Sierra Club I was living with my wife in New Orleans. I now live in Baton Rouge. I have therefore been active in the Delta Chapter of the Sierra Club for many years, including both the New Orleans Group and the Baton Rouge Group. I am informed that the Delta Chapter, which serves the entire state of Louisiana, has 3,321members as of August 2019.

5. I have served many volunteer leadership positions in the Delta Chapter during my many years of membership. From 1972 to 1974, I served as the Conservation Chairman of the New Orleans Group. My job was to identify and work on issues of interest to the organization and the members. At the time, these issues included the pollution of waters in the Mississippi River Basin and the Gulf of Mexico. There were serious problems from the strip mining of the rangia clams in Lake Pontchartrain, Atchafalaya Bay, and the Calcasieu River Basin. The pollution caused by this strip mining deprived people of safe access to these water resources for boating, swimming, fishing, and crabbing. Of particular concern were the problems caused to the habitats for fish, wildlife, and threatened and endangered aquatic species.

6. In 1974, I was elected Chairman of the New Orleans Group and held that position for one year. My job was to work with the members of the board of the Delta Chapter which included groups in Louisiana and Mississippi. The New Orleans Group experienced great growth during this time, reaching a membership of 600. The outings program and monthly meetings which were well attended were especially important aspects of the New Orleans Group. We hosted good speakers and offered lots of outings for folks to go on.

7. For the last five years I have served as Conservation Chairman for the Delta Chapter. For the last two years I have also served as the Conservation

Chairman for the Baton Rouge Group. My role has been to work on a variety of conservation and environmental justice issues throughout the Mississippi River Basin and the Gulf of Mexico, which are primary recreational and environmental interests for the Delta Chapter and the Baton Rouge Group. I have been working on threats to waterways in the Louisiana Natural, Scenic and Historic River System. This includes waste from the paper mill at Bogalusa, Louisiana, which has led to the death of more than 26 threatened Gulf Sturgeon in the Pearl River.

8. Other recent major projects of the Delta Chapter include the identification of the massive chemical waste contamination in the Calcasieu River Basin caused by the PPG facility on Bayou D'Inde just west of Lake Charles.

9. In 1994, the Sierra Club published a book called Deeper Shades of Green, by Jim Schwab. In the chapter on Louisiana, I am described as the "grandfather of the environmental movement in Louisiana." There were many others involved in the movement before me, but few worked to connect folks together or to help people get organized in the way that I did.

10. I am a member of the Sierra Club because it has allowed me to work on issues I care about and with people who are knowledgeable, willing, and able to work on complex environmental and social justice challenges.

11. It is my understanding that the federal Renewable Fuel Standard has contributed to the intensification and expansion of cropland dedicated to corn,

especially in the Mississippi River Basin. I am concerned by the resulting loss of native prairie, nutrient and pesticide runoff, and increased com prices.

12. I am also concerned about the production of the pesticides and other chemicals used for this industrial scale agriculture and their storage. I remember hearing of a Texas community that was destroyed when the fertilizer warehouse in the town exploded.

13. The dead zone in the Gulf of Mexico is particularly concerning to me. The input of chemicals for the growth of corn for ethanol has led to runoff to the Mississippi River, contributing further to the dead zone. This should all be preventable.

14. For most of my life I have been exposed to polluted waters in the Mississippi River Basin and the Gulf of Mexico where I can remember millions of fish and wildlife killed since at least the 1950s. Two books that helped me to better understand what I was seeing and smelling were Silent Spring and Since Silent Spring. In Silent Spring the author, Rachel Carson, describes how insects, earthworms, and aquatic species remove deadly chemicals like DDT and Endrin from the water. These chemicals then bioaccumulate in animals higher up on the food chain. In Since Silent Spring, in the chapter on the pesticide Endrin, we are told how Louisiana could not figure out why all of the fish, snakes, birds, and

wildlife along the lower Mississippi River and the waters along the coast of the Gulf of Mexico were dying in the 1950s and 1960s.

15. These books, my experiences growing up in the Gulf region, and my desire to keep this area healthy and beautiful for all people inspire much of my environmental work. I have helped to organize groups in every parish of Louisiana and in every state in the USA on a wide variety of environmental and social justice issues and challenges.

16. I have worked with numerous sport and commercial fishermen, biologists, marine scientists, students, reporters, and others who have been impacted by the Gulf dead zone areas, or who are trying to understand what causes the dead zones. I have worked with numerous researchers of the Louisiana University Marine Consortium (LUMC) who have spent decades documenting the dead zone in the Gulf of Mexico.

17. There is a researcher at LUMC who is studying the dead zone who I work with fairly often. I primarily work on getting the information that she produces every year out to the public. I enjoy helping the public understand what her work is saying and what it means for the Gulf.

18. In the past, I have gone out on the researcher's boat to learn how she and her team operate. We were in habitat for Gulf sturgeon and loggerhead sea

turtles. I enjoy being out in their habitat and experiencing where they live and hope to do so again in the future.

19. I am retired and now spend much of my time volunteering for environmental organizations, including serving on several Boards of Directors. What I enjoy doing the most is raising people's awareness and helping them to understand the environmental issues around them. I enjoy connecting like-minded individuals on issues they are concerned about and helping them to learn how to organize and work with the media. I also work a great deal with the media around the country myself. I help them get information about environmental issues and related research, as well as understand what the information means and does not mean. When there is specific information that they are interested in, I lead them to contacts of mine that can help them further.

20. Much of my work would not be possible without the valuable information gathered by scientists studying species such as the Gulf sturgeon, loggerhead sea turtle, piping plover, and sperm whale. Their data is essential for my understanding of the health of the Gulf and these populations of listed species. If researchers are no longer able to study these species, I will lose valuable data and communication tools, as wildlife is something that is easy for many people to connect with.

21. In 2016, scientists measured the largest dead zone in the Gulf of Mexico from the fertilizers which run into the Mississippi River and the Gulf of Mexico from the Midwest. Pollution of other rivers, from nutrient runoff caused by conversion of land to grow corn for ethanol, also enters the Gulf of Mexico and causes smaller dead zones elsewhere besides the Mississippi.

22. One federally-listed species that has been impacted by runoff in the Mississippi River Basin is the "threatened" Gulf Sturgeon. I am active in efforts to protect the Gulf Sturgeon and its habitat, including writing comments in June 2011 on the Draft Plans for the Bogue Chitto Refuge. It is our government's duty to protect listed species, and it distresses me to know that in spite of my best efforts the Sturgeon seems to be protected in name only. If Gulf Sturgeon populations are decimated from agricultural runoff resulting from land conversion to grow corn for ethanol, my work will be harmed because it will not be possible to continue studying the species and to evaluate the outcomes of my work.

23. It is my understanding that the Sierra Club is filing this lawsuit against the EPA for failing to initiate and complete consultation with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service in taking actions under the Renewable Fuel Standard, thus violating the Endangered Species Act. I understand also that the EPA has allowed land not in cultivation before 2007 to be converted to cropland to produce corn for ethanol and that EPA did not use its

general waiver authority to lower renewable fuel volumes. I support the Sierra Club in this endeavor. I am frustrated by the staff of the EPA and the members of Congress who do not seem to understand the complexities of their jobs and the failures which have been caused by the lack of laws, or enforcement of existing laws, and funding to protect human health and the environment. The Sierra Club and many other groups have taken it upon themselves to use the court system to try to see to it that existing laws are, at least, enforced. If the Sierra Club is successful in this lawsuit, my concerns about how production of renewable biomass to satisfy the volumes included in the new rule is adversely affecting threatened and endangered species (for example, the Gulf sturgeon), their habitat, and the environment, will be redressed.

I declare under the penalty of perjury under the laws of the United States that, to the best of my knowledge, the foregoing is true and correct.

Dated October 4, 2019.

William A. Fontenot

Exhibit 6

NOT YET SCHEDULED FOR ORAL ARGUMENT
Case Number 19-1023 and consolidated cases

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL WILDLIFE FEDERATION, HEALTHY GULF, AND SIERRA CLUB, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and ANDREW R. WHEELER, Administrator, United States Environmental Protection Agency Respondent.	No. 19-1039 (consolidated with 19-1023, 19-1027, 19-1032, 19-1033, 19-1035, 19-1036, 19-1037, 19-1038)

DECLARATION OF C. ELAINE GIESSEL

DECLARATION OF C. ELAINE GIESSEL

I, C. Elaine Giessel, hereby state as follows:

1. I am of legal age and am competent to give this declaration. All information herein is based on my own personal knowledge unless otherwise indicated. I give this declaration for use in the Sierra Club's legal challenges to the Environmental Protection Agency's (EPA) Renewable Fuels Standard program.

2. I currently reside in Overland Park, Kansas, where I moved with my husband since 1999.

3. My late husband and I initially joined in 1981. We became joint "Life" dues-paying members of the Sierra Club before he died. The Sierra Club is a nationwide non-profit environmental membership organization. Its purpose is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives. The Sierra Club has a chapter in Kansas called the "Kansas Chapter." I am informed that the Kansas Chapter has 5,435 members.

4. I am a marine ecologist by training and a certified Kansas State University Extension Master Naturalist. I grew up hunting and fishing in

Texas and have a deep appreciation of the environment and wildlife. My hobbies are gardening (including planting specifically for wildlife, such as monarch butterflies and other pollinators), camping, and birdwatching. All of my jobs have been related to environmental education and natural resource protection. As a park naturalist, I educate visitors on the value of native grasslands and help restore prairies in the area, including seed collection. I therefore joined the Sierra Club because I believe it is the most effective environmental grassroots organization nationwide. Sierra Club utilizes experts to develop informed policy positions with which its members can educate the public, lobby decision-makers, and defend the environment through litigation, if necessary.

5. I have held several leadership positions in my time as a member of the Sierra Club. I was on the Executive Committee of the Texas Chapter, known as the Lone Star Chapter, for about five years before moving to Kansas. During this time, I focused primarily on freshwater and coastal marine issues, including the annual formation of the hypoxic area in the Gulf of Mexico. Since 2000, I have served almost continuously on the Executive Committees of both the Kanza Group (Kansas City metro area) and the Kansas Chapter in various capacities, including Chair, Vice-Chair, Conservation Chair (covering wildlife/endangered species, solid waste,

marine, toxics, wetlands, water quality, and environmental justice issues, as well as Environmental Education, and Volunteer management. At the national level, I have served on the Environmental Quality Strategy Team for five years in the 1990s, and the Marine Action Team and on the Water Sentinels Leadership Team for four years now. The Water Sentinels are a grassroots network team of volunteers addressing issues of water quantity and quality across the nation. As a member of the Leadership Team, I am part of a core group which helps to coordinate activities nationwide, in addition to actively working on water issues in my area of Kansas. I also serve as the liaison to the Land, Water and Wildlife team.

6. I have been involved in many organizational activities, including attending outings, Executive and Conservation Committee meetings, planning meetings, Chapter conferences, and national training workshops. I also spent a number of years as a Sierra Club member in Texas helping to ensure freshwater inflows to estuaries. I helped establish the Gulf Restoration Network over 30 years ago to address the "Dead Zone" and served on its board before moving to Kansas. There, I developed a program called "Heartland-Ocean Connections" that I present to various groups describing the ways that agricultural activity in the Midwest contributes to the deterioration of marine habitats.

7. I am very concerned about the impacts to wildlife, in particular federally listed endangered and threatened species, that I have observed from the conversion of native grassland habitat for use to produce corn over the last decade. On a recent trip to Wyoming and Colorado (September 9-21, 2019), I drove the backroads of northwest Kansas, camping at Wilson Lake, Prairie Dog State Park (Keith Sebelius Lake), and Webster Reservoir. I stopped one afternoon at Kirwin National Wildlife Refuge, a stopover for whooping cranes, to do some birding. The landscape surrounding these public areas is clearly dominated by corn fields, most of which are under irrigation in a region where the surface water which feeds the lakes is threatened by groundwater depletion and nutrient-laden runoff.

8. Prairie dogs, which are a keystone species on the prairie, have suffered also from these agricultural practices reducing their native habitat; several attempts have been made to list them. Without extensive prairie dog colonies, we will never witness the re-establishment of viable populations of endangered black-footed ferret in Kansas, as the ferrets prey on prairie dogs and use prairie dog burrows as shelter. Over 100 other wildlife species are directly dependent upon prairie dogs for survival.

9. I have been active in supporting prairie dog colonies in Kansas with the ultimate goal of re-establishing the endangered black-footed ferret across the

landscape. In 2016, I helped translocate a population of about 500 prairie dogs from Bureau of Land Management land in Satanta, Kansas to a privately owned ranch near Medicine Lodge, Kansas. The owner of the ranch employs a biologist who, along with local nonprofits, has continued to monitor the colony. While Conservation Chair of the Kansas Chapter of the Sierra Club, part of my job was distributing news about the colony to our membership and about general progress toward re-establishing endangered black-footed ferrets in the state. If cropland for ethanol production continues to expand across and around prairie dog habitat and potential black-footed ferret habitat, it may prevent me from reaching my end goal and the goals of the Sierra Club's Kansas Chapter and our partners at the ranch to re-establish viable populations for endangered ferrets.

10. Monarch butterfly populations, which depend on native grasslands for food and nectar resources, have hit an all-time low; the species is currently under review for listing as threatened; a decision on their status is expected on December 15, 2020. The number of migratory adults appeared to have rebounded a little this year, most likely due to a wetter breeding season in the Midwest, but the final number of monarchs that arrive in Mexico for the winter will indicate if this is the case. I also understand that the California population was not healthy this year. Kansas historically provided critical breeding and migratory stopover habitat for this butterfly. Monarch butterfly populations

declined to their lowest point in 2014, in part due to genetically modified (GMO) corn production spurred in part by the Renewable Fuel Standard and associated weed control in the Midwest. I served on a statewide Monarch task force during the year of their inception to develop strategies primarily to address loss of critical habitat for the butterfly in Kansas.

11. I have personally invested decades of my time and energy on Monarch conservation, both in Texas and in Kansas. I have created butterfly gardens at home and in public locations, like the Texas Zoo in Victoria, Texas. I have created educational materials, reported observations to citizen science projects, conducted tagging, grown multiple species of milkweeds, raised dozens of caterpillars for Monarch public events and provided numerous presentations for garden clubs and other groups. A few years ago, I became part of the Kansas Monarch Summit, specifically on the Urban/Outreach task force. I attended the "National Protecting Pollinators in Urban Landscapes" conference in Michigan in October 2017 and presented a poster on a local pollinator project in my area.

12. Despite increasing focus on the plight of the Monarch, and on pollinators in general, current trends in agricultural production, including genetically modified varieties popularized in part by the Renewable Fuel Standard and new pesticides, along with cropland conversion and intensification to grow corn for ethanol, will continue to have serious impacts on the diversity of prairie insect species and the

wildlife food chains they support. Dr. Chip Taylor of Kansas University has done research on the impact of using GMO Roundup-Ready corn and the herbicide to reduce weeds in corn fields throughout the Midwest. The Roundup kills the milkweed plants that used to be common between the corn rows and was used by monarch butterfly caterpillars. Since a large proportion of the fall migratory population has historically been derived from the Midwest, the loss of milkweeds in corn fields can have a big impact on adult populations. The more butterflies we lose, including both the monarch and already listed species such as the threatened Dakota skipper, the more opportunities are lost for scientists like me to study these creatures.

13. The overall intensification and expansion of cropland dedicated to corn for ethanol is associated with the increased application of fertilizers and pesticides and is leading to poorly controlled runoff of sediments, contaminants, and nutrients into Kansas reservoirs. The nutrients running off into our waterways include phosphorus and nitrogen, which are known to cause algal blooms and hazardously low levels of dissolved oxygen. At the watershed level, the hypoxic zone at the mouth of the Mississippi River, discovered decades ago, is due in large part to increased nitrogen loading from upstream agriculture. This hypoxic zone continues to expand, despite efforts upstream to educate growers about the impacts of nitrogen-laden runoff on marine environments.

14. About six years ago my husband and I bought a small pickup truck camper, and would camp about five times a year on various Kansas lakes with our dog. We usually went in the spring and fall when nights are cooler. We took our canoe with us so we could observe aquatic wildlife, such as mussels, beaver, muskrat, various species of fish, herps (reptiles and amphibians), insects, and birds. We swam and played Frisbee with the dog in the water. Over the years, the Kansas lakes we visited include Shawnee Mission Lake, Heritage Park, Stoll Park, Hillsdale, Perry, Milford, Pomona, Melvern, Kanopolis, Cedar Bluff, Scott, and Wilson. As I mentioned above, I have just returned from a solo two-week trip with my dog in the camper. I camped at several Kansas lakes: Wilson Lake, Kirwin National Wildlife Refuge, Keith Sebelius Lake and Webster Reservoir; as well as a few in Nebraska: Swanson and Enders. At each of these stops, my dog enjoyed swimming. It was a very enjoyable trip and I plan to continue camping at lakes such as these in the Midwest.

15. I have personally observed in the lakes I have visited more toxic algal blooms caused by increased nutrient runoff and increased sedimentation, which is related both to the loss of topsoil which occurs when natural vegetation is cleared and to the planting of row crops progressively closer to the water's edge over the years. Over the years I have noticed these issues

escalating, especially in the last seven years when I have been spending more time visiting local lakes. For example, while canoeing on local lakes I have observed row crops of corn planted virtually to the water's edge without any riparian/prairie grass buffer strips to control runoff.

16. The toxic algal blooms are a significant and growing issue in Kansas. They are increasing in both frequency and duration. In May 2018 I attended a conference called the Kansas Water Summit in Lawrence, Kansas where we discussed this issue at length. The blooms are often so bad that they cause restricted use on the lakes because they are dangerous to pets and people. For example, you cannot fish, swim, or boat in a lake with a toxic algal bloom. This phenomenon is directly related to runoff into the waterways from agriculture. In addition, tax dollars are being spent now to dredge the reservoirs to restore storage capacity.

17. By comparison, the lakes not surrounded by row crops are in noticeably better condition. I have seen the difference between lakes in different settings through my personal travels, as well as my previous ones with my husband and dog. It is apparent that the lakes surrounded by rangeland, like Wilson Lake, are much clearer than nutrient-laden lakes surrounded by cropland. Milford Lake has been so impacted by algal blooms that public advisories have been issued fairly regularly. Over the years, we observed extensive algal growth

on some of our lake visits. The loss of native wildlife as a result of this algal growth would impinge on my enjoyment of recreating on this lake.

18. Virtually every waterway and lake in Kansas, including most of those I listed as recreation destinations, are listed as impaired in one or more segments, many for recreation and aquatic life, and some for water supply. Coliforms and nutrients/oxygen-impairment (eutrophication) are common problems. Atrazine, commonly applied to corn fields in the spring, along with other pesticides, is also listed as a source of impairment in several water bodies. Arsenic and phosphorus, associated with sediment inflow from agricultural production, are also impairing water quality.

19. Increased corn ethanol production is also leading to decreased capacity to store water for drinking, flood control, and irrigation. Specifically, in the last decade, I have noticed that more grassland and rangeland have been converted for crop production, particularly irrigated corn fields in western Kansas, which draw significant water from our limited groundwater resources. The High Plains Aquifer continues to decline at an alarming rate due to pumping for corn production.

20. Irrigated farmland which is reducing groundwater levels in western Kansas has resulted in the loss of instream flow to headwater streams, loss of wetland habitat and decreased water quality. Native grassland conversion to croplands,

which contributes to eutrophication, sediment loading and increased impairment of adjacent waterways is adversely impacting aquatic life. Kansas is home to 40 living species of native freshwater mussels, 8 of which have already been extirpated. Over half the mussels today are listed as state threatened, endangered or species-in-need-of-conservation (SINC). Freshwater mussels have been identified as one of the most imperiled groups of animals in North America. They are frontline indicators of water quality and are inextricably tied to different fish species for successful reproduction and range expansion. As a naturalist, I enjoy collecting freshwater mussel shells. They help me make personal observations about and informally track water quality—greater diversity and abundance of mussels indicates healthier water quality. I have noticed that I find fewer shells and less diversity in lakes and other waterways which are closer to intensive agricultural areas and are more polluted with runoff from agriculture. Mussels continue to be "canaries in the coalmine" for aquatic species. They are impacted by pollutants, sediment runoff, low water flow, loss of host fish populations and increasing temperatures, and continue to be vulnerable to water quality degradation and stream flow changes.

21. I have a history of working with endangered whooping crane critical habitat, which often supports endangered piping plover as well. In Texas, in 1997, I helped create the Friends of the Aransas and Matagorda Island National

Wildlife Refuges, edited their newsletter, and served as President and board member before moving to Kansas. I have family living on the Texas coast, and I like to visit them at least once a year. Every time I visit, I take a trip to the Aransas National Wildlife Refuge to see the whooping cranes. The Aransas NWR is critical habitat for the species. I love going in the spring because that is the time of year when you get to see the chicks. A few years ago we visited them in March and took a boat out into the refuge. There we observed three pairs of whooping cranes, two of which had chicks. I have been making this trip to the Texas coast annually for a long time, and plan to continue. Seeing the cranes is one of the biggest highlights of this trip. Destruction of healthy Midwest wetland stopover habitat for this migratory bird, as a result of increased crop production for biofuels, would be a loss to my family, to bird lovers everywhere, and to American taxpayers, who have underwritten decades of conservation efforts to save this iconic species.

22. Here in Kansas, I am a member of the Friends of Quivira NWR, which my husband and I visited a few years ago, in addition to the wetlands at Cheyenne Bottoms State Waterfowl Management Area in central Kansas. This fall I visited the Kirwin NWR in north central Kansas. All are key stopovers for whooping crane migration and are designated as critical habitat for the species, in addition to being home to an abundance of birdlife observable only in few

areas of the state. These areas have had water supply issues. Farmers with more junior water rights have been taking water upstream of these wetlands, which has had impacts on wetland conditions that the birds require. Corn production spurred beyond sustainable levels in part by the Renewable Fuel Standard is certainly one major factor contributing to the water resource issues.

23. I have been informed that there has been considerable conversion of land to plant biofuel feedstock crops near whooping crane critical habitat in Kansas, including the Quivira NWR and Cheyenne Bottoms. Given the overall pattern I have observed across Kansas of converting prairie to cropland, I am not at all surprised to learn this unfortunate pattern has continued in the vicinity of two wild places I cherish and enjoy visiting several times per year. I intend to continue visiting Quivira NWR and Cheyenne Bottoms for the foreseeable future, but this enjoyment would be greatly diminished by the loss of the whooping cranes.

24. I intend to continue to camp in Kansas and enjoy its water resources. I observe birds and other wildlife wherever I travel, including the Texas coast. I see more species of bird in native aquatic and upland habitats than in cropland and more diversity of aquatic life in healthy lakes and waterways. The loss of critical wetland habitats at Quivira and Cheyenne Bottoms would threaten populations of

migratory wading birds and waterfowl, including federally endangered and threatened bird species.

25. Watching shorebirds, waterfowl and wading birds, including whooping cranes and piping plovers, was a tradition of my husband and mine. The loss of these species would mean a loss of one of my favorite activities.

26. In addition, as a scientist who has dedicated much of her life to protecting these birds, the loss of an opportunity to continue studying them and how their populations have fared as a result of some of my own conservation efforts would be damaging to me professionally and personally.

27. It is my understanding that the Sierra Club, Healthy Gulf, and National Wildlife Federation have filed a lawsuit against the U.S. Environmental Protection Agency for failing to consult with the Fish and Wildlife Service and National Marine Fisheries Service in regards to potential effects on and jeopardy to federally threatened or endangered species. I understand that the lawsuit also challenges EPA's policy to permit land not in cultivation prior to 2007 to be converted to cropland and EPA's decision to not invoke its general waiver authority to reduce renewable fuel volumes in light of the severe environmental harms stemming from the production of renewable fuels. I support this effort and other legal actions to address the environmental and species specific harms caused by the Renewable Fuel Standard. If proper action is taken to address the impacts

from this program, as a lifelong wildlife observer and environmental educator committed to conserving biodiversity, I would benefit from being able to enjoy my retirement years, gardening for wildlife, birdwatching and recreating on Midwest waterways.

I declare, under penalty of perjury under the laws of the United States, that the foregoing is true and correct to the best of my knowledge.

Dated 10/02/2019

Signed,

C. Elaine Giessel

C. Elaine Giessel

Exhibit 7

NOT YET SCHEDULED FOR ORAL ARGUMENT
Case Number 19-1023 and consolidated cases

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL WILDLIFE FEDERATION, HEALTHY GULF, AND SIERRA CLUB, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and ANDREW R. WHEELER, Administrator, United States Environmental Protection Agency Respondent.	No. 19-1039 (consolidated with 19-1023, 19-1027, 19-1032, 19-1033, 19-1035, 19-1036, 19-1037, 19-1038)

DECLARATION OF KATHERINE M. SLAMA

DECLARATION OF KATHERINE M. SLAMA

I, Katherine M. Slama, hereby state as follows:

1. I am of legal age and am competent to give this declaration. All information herein is based on my own personal knowledge unless otherwise indicated. I give this declaration for use in the Sierra Club's legal challenges to the Environmental Protection Agency's (EPA) Renewable Fuel Standards Program.

2. I reside in Spicer, Minnesota. I have lived in the area since April 1992. I previously resided in South Dakota.

3. I have been a dues-paying member of the Sierra Club since 1982. The Sierra Club is a nationwide non-profit environmental membership organization. Its purpose is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives. The Sierra Club has a chapter in Minnesota called the "North Star Chapter." I am informed that the North Star Chapter has over 18,900 members. I am also a founding member of the Willmar Area Climate Action Group, established in 2019.

4. I have held multiple leadership positions within the Sierra Club. Over the years I have served as an outings leader and, since 2012, as a member of the North Star Chapter Legislative Committee. Prior to my move to Spicer, I lived in South Dakota, where I was a Board Member of the Sierra Club's Dacotah Chapter.

5. I have also written articles for the North Star Chapter Newsletter, communications to local members and letters to the editors of local newspapers on topics of interest to our Chapter.

6. I am a member and volunteer with the Sierra Club because so much is at stake: our water, land, soil, health, and the future of our children and the Earth. I feel that the Sierra Club makes a difference because we need to be helping people understand the issues and the resources that are at stake.

7. I am very concerned about the impacts of the intensification and expansion of cropland dedicated to corn for ethanol in my region of Minnesota. I have noticed fewer butterflies as the acreage of native prairie is converted to cropland for the production of corn and the use of pesticides increases as part of that production. Greater volumes of pesticides are used to grow corn for ethanol as opposed to leaving native prairie in its existing or natural state. Increased use of Bt corn, a genetically modified organism (GMO), also has led to a decrease in butterflies and other pollinators, as it is toxic to their larvae.

8. I have also noticed that acreage set aside through the federal Conservation Reserve Program (CRP) decreases whenever the price of corn is high, and I have noticed this decrease incrementally over the years. This program pays farmers to remove environmentally sensitive land from agricultural production and instead plant native species that will improve environmental

health and quality. The Renewable Fuel Standard has made it more profitable to remove land from the Conservation Reserve Program and instead grow corn to be sold to ethanol companies. This pattern further contributes to the loss of native habitat.

9. My husband and I love butterflies and have planted our yard with butterfly- friendly species, but in the last few years there has been a noticeable decrease in the number of butterflies visiting our yard. I believe this loss is at least partially attributed to the loss and degradation of native habitat due to the expansion and intensification of cropland dedicated to corn for ethanol about a half mile from our property, as well as just upstream of Nest Lake, upon which our property is situated. I have noticed this expansion of cropland dedicated to corn for ethanol increase gradually over the years. Prior to this, I believe this land was used for grassland, CRP, or other crops. We have seen a loss of flowering plants for the butterflies to feed on and an increase in pesticides and Bt corn that are toxic to butterflies. This has been a significant aesthetic blow to our enjoyment of our property, as the butterflies are truly a spectacular sight.

10. Several times each summer we go to Roscoe Prairie, Regal Meadows, and Ordway Nature Conservancy prairies and others nearby to view and photograph wildlife. I have also led Sierra Club outings to some of these prairies. We also go at least monthly to Sibley State Park, which is part prairie. I

love viewing the wildlife at these sites, especially the butterflies. Only out on the native prairie have I ever been able to view the rare and beautiful threatened Dakota Skipper. I have tried to capture a photo, but have not been able to get a good one. It is meaningful to me to see such a rare butterfly; I was very excited to see it and so disappointed to have missed the photo. I would very much like to see more native habitat healthy enough for me to be able to again see this species and others and photograph them. Since Sibley State Park is only about ten miles from our home, we go there several times a year to hike, view wildlife, and cross country ski and plan to continue to do so.

11. Over the years I have noticed a loss of diversity and abundance of butterflies, especially monarchs, at Sibley. In addition to the monarchs, I have now have difficulty finding the regal fritillary, a once-common butterfly in our area. I am concerned that butterflies such as the Dakota Skipper will only become rarer at Sibley, as it is directly adjacent to cropland which appears to be dedicated to the intensive cultivation of corn.

12. We also visit out-of-state prairies and rivers on various nature hiking and photography trips, including Sheyenne National Grassland in North Dakota. This area provides habitat for the Dakota skipper and the Poweshiek skipperling. When my husband and I visit the area, we enjoy searching for these butterflies and very much hope to spot them on future visits. Unfortunately there is a great

deal of cropland, used for corn, directly adjacent to the protected area. We have occasionally visit this grassland, and intend to return in the next few years and would be disappointed to find that much of the wildlife there has suffered a similar fate as what we have observed at Sibley State Park. The loss of the listed butterflies I noted above from the Sheyenne National Grassland would impede our enjoyment of searching for them during our visits to the area.

13. We used to live near a stretch of the Missouri River in South Dakota which includes a section that has been designated as a Wild and Scenic River. The Wild and Scenic portion stretches from near Yankton, SD to near Pickstown, SD. We would often canoe the portion from Running Water, SD to Pickstown and noticed intensive cropland planted right up to the edge of the river valley. We would see piping plovers on the sand bars and use our binoculars and telephoto lenses so as not to bother them. This is a very special place to my husband and me, and we intend to return in the future. Looking for and seeing the Piping plovers have always been a highlight of our canoe trips, and I would love to see them again on future trips. They are such attractive little shorebirds. Our enjoyment of these trips would be diminished if we were to return to find fewer Piping plovers or none at all. Given the efforts that have been made to better protect the Piping plovers, it pains me that they are further endangered by reckless planting practices of corn for ethanol, for example, the intensive cropland

we have seen planted so close to the edge of the river valley over the recent years. We enjoy visiting this area, and are likely to canoe it again.

14. In addition, I seldom see bobolinks, a bird species identified by the U.S. Fish and Wildlife Service as a "Bird of Conservation Concern," during my travels or back home. I am concerned that more bird species, such as the Piping plover, will suffer a similar fate. I love birdwatching; it is one of my favorite things about living in the Midwest. To lose more birds due to the loss of native habitat would be devastating to me. We have marsh on our land and we really care about the birds we see here and in our travels. We are outdoor photographers and do a little nature writing as well. Losing this wildlife would mean losing some of our favorite hobbies.

15. We live on Nest Lake, an impaired waterway, and we canoe, fish, and swim there at least monthly. We are daily birders and enjoy watching waterfowl and other birds attracted by our waterways, as well as mammals that live near or in the water. We use other waterways in Minnesota recreationally as well. The further we get away from agriculture, the more wildlife we see and the cleaner the waterways appear to be. The Minnesota Crow River has a real problem with excessive algal growth from the conversion of tall grass prairie to cropland along its banks, which leads to more algae in our lake. When there is a lot of algal growth it is not pleasant at all to be on the water as it smells and looks

terrible. In our area in Minnesota you can only safely swim or eat fish from about 20% of the waterways because of the runoff from agriculture.

16. In years of higher precipitation, when more fertilizer is washed into the Crow River watershed, we see more water weeds and algae, sometimes to the point that swimming is unpleasant. We have also noticed that the well which supplies our drinking water has acquired an unpleasant taste in the last two years, which makes me think that perhaps some of these fertilizers or pesticides are penetrating into our groundwater. We are therefore forced to use additional filters for our drinking water.

17. Now that my husband and I have retired, we hope to use our waterways recreationally even more often than we have in the past, boating, swimming, and viewing wildlife such as the Piping plover. Unfortunately, as I noted previously, contamination from fertilizer runoff has made some of these waterways unpleasant to spend time in, interfering with our ability to use them enjoyably and safely.

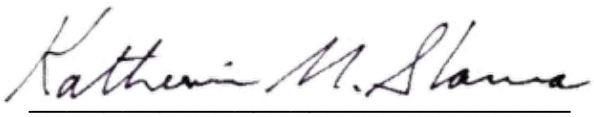
18. It is my understanding that the Sierra Club, Healthy Gulf, and National Wildlife Federation are filing a lawsuit against the EPA for failing to initiate and complete consultation with the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) in taking actions under the Renewable Fuel Standard program in violation of the Endangered

Species Act. Additionally, I understand that EPA has allowed the conversion to cropland of land that was uncultivated prior to 2007 and failed to use its general waiver authority to reduce renewable fuel volumes. I support this lawsuit because I have personal, aesthetic, and recreational interests in the ecological health of native grasslands, the Dakota skipper, the piping plover, and other butterflies and birds. If the EPA were to assess the impacts to land and water, and consult with the Services in regards to impacts from the Renewable Fuel Standard on these species, measures could be taken to protect them from the harmful impacts of intensification and expansion of cropland dedicated to corn production for ethanol fuel. Proper consultation could lead to better protections for these species, and we would benefit from being able to continue to enjoy improved water quality and watching and photographing the wildlife, both where we live and other places we travel for recreation. Similarly, by reducing renewable fuel volumes and protecting land that was uncultivated prior to 2007, more habitat would be preserved for species and detrimental agricultural impacts would be lessened.

I declare under the penalty of perjury under the laws of the United States that, to the best of my knowledge, the foregoing is true and correct.

Dated October 2, 2019.

Signed,



Katherine M. Slama

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2019, I filed the foregoing Opening Brief using the Court's CM/ECF system, which will serve notice of the filing on all parties in this case.

Respectfully submitted,

/s/ Peter Lehner
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